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UNITED STATES REPORTS

VOLUME 276

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1927

FROM JANUARY 16, 1928, TO AND
INCLUDING APRIL 9, 1928

ERNEST KNAEBEL
REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

WILLIAM HOWARD TAFT, Chief Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
EDWARD T. SANFORD, Associate Justice.
HARLAN FISKE STONE, Associate Justice.

JOHN G. SARGENT, Attorney General.
WILLIAM D. MITCHELL, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

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[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see p. IV, *post*.

135420

SUPREME COURT OF THE UNITED STATES

October Term, 1926 [1]

Order of Allotment of Justices

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, Oliver Wendell Holmes, Associate Justice.

For the Second Circuit, Harlan Fiske Stone, Associate Justice.

For the Third Circuit, Louis Dembitz Brandeis, Associate Justice.

For the Fourth Circuit, William H. Taft, Chief Justice.

For the Fifth Circuit, Edward T. Sanford, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

For the Seventh Circuit, Pierce Butler, Associate Justice.

For the Eighth Circuit, Willis Van Devanter, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

March 16, 1925.

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[1] For next previous allotment, see 268 U. S., p. IV.

SUPREME COURT OF THE UNITED STATES

MONDAY, FEBRUARY 20, 1928

ORDER

On the application of the Clerk, pursuant to Section 221 of the Judicial Code, it is ordered that Horatio Stonier be, and he is hereby, appointed a Deputy Clerk of this Court.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1927.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY *v.* RELLSTAB.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 141. Argued January 5, 1928.—Decided January 16, 1928.

1. The power of the District Court to set aside its judgment because of perjured testimony ends with the term in which the judgment was entered. P. 4.
2. The Circuit Court of Appeals has jurisdiction, by mandamus, to require the reinstatement of a judgment of the District Court which it has affirmed and which the District Court, without jurisdiction, has afterwards assumed to set aside for perjury. P. 5.
3. Mandamus to enforce a judgment should not be refused on the ground of injustice, where the judgment has become unassailable and the injustice depends on a speculation as to which of three conflicting statements of a witness—a confessed perjurer—was true. P. 5.

15 F. (2d) 137, reversed.

CERTIORARI, 273 U. S. 685, to a judgment of the Circuit Court of Appeals which refused to grant a writ of mandamus requiring the District Court to reinstate a judgment which it had assumed to set aside. The judgment was one recovered by the above named petitioner as defendant in an action for personal injuries, etc. See also 296 Fed. 439.

Mr. M. M. Stallman, with whom *Mr. Frederic B. Scott* was on the brief, for petitioner.

The District Court had no power to set aside the judgment more than four terms after it was entered. *Cameron* v. *McRoberts,* 3 Wheat. 591; *Bronson* v. *Schulten,* 104 U. S. 410; *Phillips* v. *Negley,* 117 U. S. 665; *In re Metropolitan Trust Co.,* 218 U. S. 312. See also 11 Rose's Notes, U. S. Reports, 551, *et seq.; Wetmore* v. *Karrick,* 205 U. S. 141.

The acts for which a court will, on account of fraud, annul a judgment between the same parties after the term is ended, have relation to frauds extrinsic or collateral to the matter tried, and not to a fraud in the matter upon which the judgment was rendered. *United States* v. *Throckmorton,* 98 U. S. 61; *Vance* v. *Burbank,* 101 U. S. 514; *Nelson* v. *Meehan,* 155 Fed. 1.

Mandamus was the appropriate remedy. *Ex Parte Crane,* 5 Pet. 190; *McClelland* v. *Carland,* 217 U. S. 268; *United States* v. *Mayer,* 235 U. S. 55; *Life Ins. Co.* v. *Wilson,* 8 Pet. 291; *Ex Parte Bradley,* 7 Wall. 364; *In re Pollitz,* 206 U. S. 323; *Ex Parte Nebraska,* 209 U. S. 436; *In re Winn,* 213 U. S. 458; *In re Metropolitan Trust Co.,* 218 U. S. 312.

The Circuit Court of Appeals had appellate jurisdiction to issue a mandamus because the lower court's action was an interference with its mandate. *Southard et al.* v. *Russell,* 16 How. 547; *In re Potts,* 166 U. S. 263; *McClelland* v. *Carland,* 217 U. S. 268; *Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U. S. 117. See also *Simmons Co.* v. *Grier Bros. Co.,* 258 U. S. 82.

Mr. Harry Kalisch for respondent.

The writ of mandamus cannot be used as a writ of error. *Ex Parte Loring,* 94 U. S. 165; *Ex Parte Railway Co.,* 103 U. S. 794; *Ex Parte Hoard,* 105 U. S. 578; *Ameri-*

can Con. Co. v. *Jacksonville Co.,* 148 U. S. 379; 25 C. J. 860.

The Circuit Court of Appeals is a statutory court and its authority to grant writs must be found in the statute, if it exists. Mandamus in this case was not necessary for the exercise of that court's jurisdiction, which is only appellate.

The Circuit Court of Appeals can only review final decisions. *Ft. Dodge Cement Corp'n* v. *Monk,* 276 Fed. 113. See also 11 Cyc. p. 941; *Kingman & Co.* v. *Western Mfg. Co.,* 170 U. S. 675; *Bostwich* v. *Brinkerhoff,* 106 U. S. 73; *Gibbons* v. *Ogden,* 6 Wheat. 448; *Mayberry* v. *Thompson,* 5 How. 121.

Mandamus should not issue unless there has been a definite, unqualified refusal to act by the inferior court, after request. *Mesler* v. *Jackson,* 188 Mich. 195; *Hitchcock* v. *Wayne,* 97 Mich. 614; *Freud* v. *Wayne,* 131 Mich. 109; *Bennett* v. *Kalamazoo,* 181 Mich. 700; Short on Mandamus, p. 247, 267; 38 C. J., p. 592.

The granting or refusing of the writ is discretionary. *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308; *U. S.* v. *Cargill,* 258 Fed. 467; *U. S.* v. *Burleson,* 258 Fed. 282; *Arant* v. *Lane,* 249 U. S. 367; *Wood* v. *Assessors,* 137 N. Y. 203.

The fraud or perjury is a conceded fact in the case. Mandamus should not be allowed to promote a manifest injustice.

It was discretionary with the Circuit Court of Appeals to require the petitioner to have the order of the District Court reviewed by a writ of error or an appeal, rather than by writ of mandamus. *Brictson Mfg. Co.* v. *Munger,* 20 F. (2d) 793.

The basis of petitioner's application in the Circuit Court of Appeals was not the protection of the mandate of that court, but the granting of a new trial after the term at which it was rendered had expired.

MR. JUSTICE HOLMES delivered the opinion of the Court.

In this case one Ginsberg, in December, 1921, recovered judgment in the District Court against the petitioner for injuries to himself and a minor son and for the death of another son, caused by a collision, at a crossing, between the plaintiff's truck and one of the petitioner's trains. The judgment afterwards was set aside on the evidence of two important witnesses, husband and wife, that they had committed perjury at the trial. A new trial was had which resulted in a judgment for the defendant, the present petitioner. The judgment was entered on June 21, 1923. It was taken to the Circuit Court of Appeals on writ of error and on March 21, 1924, a mandate from that court affirmed the judgment with costs. See 296 Fed. 439. The witnesses who had testified for the plaintiff at the first trial testified for the defendant at the second, and after the term of the District Court in which the foregoing steps had been taken had expired without being extended in any form, the husband made an affidavit showing that his testimony at both trials was false and that in fact he knew nothing about the matter. The trial Judge was applied to, and after hearing testimony in open court he made an order on May 9, 1925, purporting to set aside the judgment that had been affirmed by the Circuit Court of Appeals during a previous unextended term. The petitioner thereupon applied to the Circuit Court of Appeals for a writ of mandamus to reinstate the judgment, but the Circuit Court of Appeals held that it had no jurisdiction to grant the writ, 15 F. (2d) 137. A writ of certiorari was granted by this Court. 273 U. S. 685.

However strong may have been the convictions of the District Judge that injustice would be done by enforcing the judgment, he could not set it aside on the ground that the testimony of admitted perjurers was perjured also at

the second trial. The power of the Court to set aside its judgment on this ground ended with the term. *In re Metropolitan Trust Co.*, 218 U. S. 312, 320. As the Court was without jurisdiction to vacate the judgment, mandamus is the appropriate remedy unless to grant that writ is beyond the power of the Circuit Court of Appeals. *In re Metropolitan Trust Co.*, 218 U. S. 312, 321. We perceive no reason to doubt the power of that Court. It had affirmed the judgment of the Court below. *Brown* v. *Alton Water Co.*, 222 U. S. 325, 332. Like other appellate courts (*In re Potts*, 166 U. S. 263,) the Circuit Court of Appeals has power to require its judgment to be enforced as against any obstruction that the lower Court, exceeding its jurisdiction, may interpose. *McClellan* v. *Carland*, 217 U. S. 268. The issue of a mandamus is closely enough connected with the appellate power.

But it is said that the granting of the writ of mandamus is discretionary and it is implied that if we are of opinion that the Circuit Court of Appeals was mistaken in denying its power to grant the writ, that court still might deny it on the ground that injustice would be done if the judgment were allowed to stand. But neither Court would be warranted in declaring the judgment unjust after it had become unassailable—certainly not on a speculation as to which of three statements is true, when it was known at the trial that the witness was perjured, either at the first trial, as he said, or then—not to speak of the further difficulties that the plaintiff might encounter in the recent decision of *Baltimore & Ohio R. R. Co.* v. *Goodman*, 275 U. S. 66. It certainly would be unjust to leave the case in the air, because the District Court had made an unwarranted attempt to set aside a judgment that it had no jurisdiction to touch.

It follows that the writ should issue.

Judgment reversed.

IN RE GILBERT.

ON RULE TO SHOW CAUSE.

Argued January 16, 1928.—Decided January 23, 1928.

1. The right of one who was a master in the federal court to retain money paid him by a party in excess of the compensation found permissible by this Court, cannot be determined by a state court in a suit between the master and such party. P. 9.
2. A master cannot rightfully accept or retain anything as compensation unless sanctioned by proper order of court. P. 9.
3. Respondent, as master in equity suits, was allowed fees which, by direction of the District Court, were paid by the successful plaintiffs before the time for appeal expired and were taxed against their opponents. On appeals by the latter, this Court decided that the fees were excessive and were awarded by the District Court in abuse of its judicial discretion. Upon return of the cases, the fees were retaxed against the defendants in the maximum amounts permitted by this Court's decision, but the respondent did not repay the excess to the successful plaintiffs, nor seek any further direction from either court respecting it. *Held,* that it was respondent's imperative duty to return the excess to the parties who paid it, whether they required it or not, together with six per cent. interest thereon from the date when the decision of this Court fixing the amounts allowable was announced; and that his conduct in retaining the excess was not "upright and according to law"—the words of the oath taken at his admission to practice before this Court. P. 9.

RULE, 275 U. S. 499, upon the respondent to make report of the fees and allowances paid him as master in several cases in the District Court, and the amounts, if any, repaid by him, and, if he received compensation in excess of the amounts heretofore limited by this Court, to show cause why he should not be disbarred and punished for contempt.

Mr. James M. Beck for respondent.

MR. CHIEF JUSTICE TAFT announced the opinion of the Court.

Under our order of November 21st, 1927, the clerk issued a rule to the respondent, Abraham S. Gilbert, of New York City, a member of this bar, which directed—

That he make written report to this Court showing what fees or allowances have been paid to him (also when and by whom paid) for services as master in the several causes reviewed here during the October term, 1921, and reported in 259 U. S. 101, under the following titles: *Newton, as Attorney General of the State of New York, et al.*, v. *Consolidated Gas Company of New York; Same* v. *New York & Queens Gas Company; Same* v. *Central Union Gas Company; Same* v. *Northern Union Gas Company; Same* v. *New York Mutual Gas Light Company; Same* v. *Standard Gas Light Company of the City of New York; Same* v. *New Amsterdam Gas Company; Same* v. *East River Gas Company of Long Island City.*

That he likewise report whether he has returned or repaid any portion of the fees or allowances received by him as such master, with dates and names of the parties. That if he has received fees or allowances as master in any of the specified causes exceeding the maximum amount held by us to be permissible, and has not returned or repaid the excess, then he shall show cause why his name ought not to be stricken from the roll of attorneys permitted to practice here and he be punished for contempt or otherwise dealt with as the circumstances may require.

On the return day, January 16, 1928, Gilbert presented himself, filed a written report, and was heard through counsel.

He asserts that he received as fees for services as master in the eight above-mentioned causes a total of $118,000; he sets out their several amounts and shows by whom and when they were paid. He avers that no one of the Gas Companies which paid these fees has ever questioned the amount or asked return of any portion, and says that he believes it was proper for him to retain them, notwithstanding they greatly exceeded what we declared permissible. But, he further says, that if this Court, after viewing his response, should conclude that he is under legal or moral obligation to return any part of them, he is willing so to do.

In December, 1921, the District Court for the Southern District of New York made allowances to respondent for services as master in each of the above-mentioned causes and directed that they be paid by the complaining corporations respectively and thereafter taxed as costs against the defendants, the Attorney General of New York and others. In obedience to such orders and before the time for appeal expired, these were paid, as follows: By Consolidated Gas Co., Dec. 13, 1921, $57,500.00; By N. Y. & Queens Gas Co., Dec. 16, 1921, $12,500.00; By Central Union Gas Co., Dec. 16, 1921, $12,500.00; By Northern Union Gas Co., Dec. 13, 1921, $7,500.00; By N. Y. Mutual Gas Light Co., Dec. 16, 1921, $11,500.00; By Standard Gas Light Co., Jan. 13, 1922, $7,500.00; By New Amsterdam Gas Co., Jan. 13, 1922, $4,500.00; By East River Gas Co., Jan. 13, 1922, $4,500.00.

The Attorney General and other defendants insisted that the allowances were excessive. The District Court overruled their objections; the matter came here and was decided May 15, 1922, 259 U. S. 101. We held that in the Consolidated Gas Company's case twice too much had been allowed and in the other causes three times too much—that the total compensation should not exceed $49,250. And further, that in making these awards the District Court abused its judicial discretion. Accord-

ingly, we reversed the challenged decrees and remanded the causes with instructions to fix respondent's compensation within the following limitations: "In the cause wherein the Consolidated Gas Company is appellee here (No. 750) not exceeding $28,750—one-half of the amount heretofore allowed; in each of the other seven causes, Nos. 751, 752, 753, 832, 833, 844 and 845, not exceeding one-third of the amount heretofore allowed therein; and in the eight cases allowances totaling not more than $49,250." We also directed "such further action in conformity with this opinion as may be necessary."

Upon receipt of the mandates, issued here June 19, 1922, the District Court ordered that the master's fees to the extent of the maximum permitted by us should be taxed against the several defendants as costs. Respondent made no effort to secure any further orders or direction by the District Court or this Court.

More than a year thereafter—December, 1923—apparently moved by published criticisms, respondent instituted a proceeding against the Consolidated Gas Company in the Supreme Court of New York under Sec. 473, New York Civil Practice Act, wherein he sought and obtained a declaratory judgment reciting that that Company had no valid claim against him for return of any part of the $57,500 which it had paid. This proceeding was ill-advised, or worse, and the pronouncement therein cannot aid him here. The state court had no power to determine the matter now before us.

Upon announcement of our opinion, May 15, 1922, it became the imperative duty of respondent immediately to return the fees received by him so far as they exceeded what we declared permissible. It is now his duty, without further delay, to return this excess with interest thereon at 6 per centum, from May 15, 1922.

When respondent accepted appointment as master he assumed the duties and obligations of a judicial officer. He could not rightfully accept or retain anything as com-

pensation unless sanctioned by proper order of court. Reception then or now of a gratuity from any party would be indefensible, and whether or no the corporations which paid him by direction of the court are satisfied with the result is now unimportant. He has long been an attorney and counsellor authorized to practice at this bar under the sanction of an oath to demean himself "uprightly, and according to law." Notwithstanding the adjudication here that excessive fees had been allowed by orders granted in abuse of judicial discretion, he has retained them for more than five years. He knew that he had got unearned money by improper orders of court, but he decided to keep it. Such conduct is far from "upright and according to law" within the fair intendment of those terms.

Further action will be postponed until Monday, February 20th, 1928. The respondent will present himself at that time and report in writing concerning efforts made to comply with his obligations.

FINANCE AND GUARANTY COMPANY *v.* OPPENHIMER, TRUSTEE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 170. Argued January 13, 1928.—Decided January 23, 1928.

1. Section 5224 of the Code of Virginia providing that all property used in his business by a person trading in his own name shall, as to his creditors, be liable for his debts, means lien creditors. P. 11.
2. Where property sold on condition reserving title in the vendor is retaken by him in accordance with the state law within four months preceding the filing of a petition in bankruptcy against the vendee, the vendee's trustee in bankruptcy acquires no lien upon it, and the retaking cannot be set aside as an unlawful preference under the Bankruptcy Act. P. 12.

5 F. (2d) 486; 15 F. (2d) 1011, reversed.

CERTIORARI, 273 U. S. 689, to a judgment of the Circuit Court of Appeals, sustaining a judgment for the respondent, as trustee in bankruptcy, in his action to recover from petitioner the value of automobiles which petitioner had retaken from the bankrupt before the filing of the petition in bankruptcy, pursuant to his right under a conditional sale.

Mr. S. M. Brandt for petitioner.

Mr. Joseph M. Hurt, Jr., with whom *Mr. J. Vaughan Gary* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the respondent, trustee in bankruptcy for W. A. Lee, to recover the value of four automobiles seized by the defendant, the petitioner, in circumstances alleged to have made the taking a preference if maintained. The defendant sold the automobiles to the bankrupt by a duly recorded contract of conditional sale. On January 10, 1921, it repossessed itself of the cars by a suit in detinue. Ten days later, on January 20, the petition in bankruptcy was filed against Lee, and on February 25, he was adjudicated a bankrupt. About a year later the trustee brought this suit relying upon the Traders' Act, § 5224 of the Code of Virginia, by which, it may be assumed, all the property used by Lee in his business, including these cars, "shall as to the creditors of any such person, be liable for the debts of such person." The trustee prevailed in the Circuit Court of Appeals. Opinion, 5 F. (2d) 486. Formal conclusion, 15 F. (2d) 1011. A writ of certiorari was granted by this Court. 273 U. S. 689.

We are of opinion that the decision was wrong for the reason given by the dissenting judge below. The Su-

preme Court of Appeals of Virginia has construed the Traders' Act and has established that "the creditors" in § 5224 means creditors having a lien. *Capital Motor Corporation* v. *Lasker*, 138 Va. 630. The lien of the trustee in bankruptcy did not arise until after the property in question had come back to the hands of the petitioner, which had reserved title to itself. *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 270. *Martin* v. *Commercial National Bank*, 245 U. S. 513, 517, Bankruptcy Act, § 47 (a) (2) as amended. U. S. C., Title 11, § 75. Therefore the retaking of the property was valid as against the trustee. It could not work a preference unless he represented a claim that was paramount when the property was seized. At that time the petitioner did what it had a right to do as against the bankrupt and simply took what was its own. It did no wrong to any creditor, for no creditor not having a judgment or other lien could have complained so far as the law of Virginia went. See *Firestone Tire & Rubber Co.* v. *Cross*, 17 F. (2d) 417, 421, 422. The majority in the Circuit Court of Appeals took the distinction between a trustee under a conventional deed of trust for the benefit of creditors and a trustee in bankruptcy, that the former has no power to vacate preferences. But, as we have implied, a party holding security does not create a preference by taking possession under it within four months if he lawfully may under the law of the State. *Thompson* v. *Fairbanks*, 196 U. S. 516. *Humphrey* v. *Tatman*, 198 U. S. 91.

We understand it to be admitted that the plaintiff is entitled to judgment for seven hundred dollars for property not covered by the petitioner's title, that amount having been allowed by the District Court, although it held as we do that the seizure was lawful. We follow the judgment in that respect. With this understanding the judgment of the Circuit Court of Appeals is reversed.

Judgment reversed.

WUCHTER v. PIZZUTTI.

ERROR TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 142. Argued January 5, 1928.—Decided February 20, 1928.

1. A state statute which provides that in actions by residents of the State against non-residents for personal injuries resulting from the operation by the latter of their motor vehicles on the state highways, service of summons may be made on the Secretary of State, as their agent, and which contains no further provision making it reasonably probable that notice of such service will be communicated to the defendants, is lacking in due process of law. Pub. Ls. N. J., 1924, c. 232, § 1. P. 18.
2. Such actions cannot be sustained by serving notice outside of the State not required by the statute. P. 24.

103 N. J. L. 130, reversed.

ERROR to a judgment of the Court of Errors and Appeals of the State of New Jersey, which affirmed a judgment recovered by Pizzutti in an action against Wuchter for personal injuries and damages to property, caused by Wuchter's operation of an automobile.

Mr. James D. Carpenter, Jr., for plaintiff in error.

This case is not controlled by *Hess* v. *Pawloski*, 274 U. S. 352; the New Jersey statute does not require process to be forwarded to the non-resident and postponing of judgment awaiting an appearance.

The fact that notice of plaintiff's intention to assess damages on writ of inquiry before a sheriff's jury was served on the defendant personally in Pennsylvania, could not cure the failure to serve the summons and complaint upon him personally within the territorial limits of New Jersey. Judgment interlocutory was entered by default against the defendant before any notice was served upon him, other than the statutory service upon the Secretary of State. The statute is therefore void under the Fourteenth Amendment. *Pennoyer* v. *Neff*, 95 U. S. 714;

Goldey v. *Morning News,* 156 U. S. 518; *McDonald* v. *Mabee,* 243 U. S. 90; *Flexner* v. *Farson,* 249 U. S. 289; *Penna. Ins. Co.* v. *Mining Co.,* 243 U. S. 93.

The statute is repugnant to Article IV, § 2 of the Constitution, in that none but residents may bring suits under it, and none but non-residents may be sued. *Chambers* v. *B. & O. R. R.,* 207 U. S. 142; *Cole* v. *Cunningham,* 133 U. S. 107; *Paul* v. *Virginia,* 8 Wall. 168; *Sou. Ry. Co.* v. *Greene,* 216 U. S. 400; *Herndon* v. *Chicago, R. I. & P. R. Co.,* 218 U. S. 135; *Roach* v. *Atchison, T. & S. F. R. Co.,* 218 U. S. 159.

Mr. Jacob R. Mantel for defendant in error.

This case is controlled by the decision in *Hess* v. *Pawloski,* 274 U. S. 352. *State* v. *Belden,* 193 Wis. 145; *Kane* v. *New Jersey,* 242 U. S. 160; *Pawloski* v. *Hess,* 250 Mass. 22; *Packard* v. *Banton,* 264 U. S. 140; *Missouri* v. *North,* 271 U. S. 40.

Plaintiff in error was informed of the pending action, and opportunities were afforded him to step in and defend, (1) when the summons and complaint were first served upon him by the Secretary of State by mail; (2) when notice that a writ of inquiry of damages would be executed was personally served upon him at his residence in Allentown, Pennsylvania; and (3) when notice of motion for final judgment was personally served upon him at his residence in Allentown. See *Chicago* v. *Sturgess,* 222 U. S. 313.

In New Jersey, in actions in tort, such as this, it is required that, before the plaintiff executes his writ of inquiry, a notice be served upon the defendant; and also, as in this case, the damages being assessed by writ of inquiry, no judgment thereon can be entered without notice thereof being given to the defendant. 3 N. J. Comp. Stats. §§ 138–139.

The New Jersey statute is not repugnant to Article IV, § 2 of the Constitution. Nowhere is there a prohibition

against a non-resident taking advantage of the statute. The law does not differentiate between the citizens of New Jersey and the citizens of any other State. All are equally compelled to obey regulations concerning motor travel, and all are equally liable in its courts.

The statute does not abridge the privileges or immunities of citizens of the United States. *Western Turf Ass'n* v. *Greenberg,* 204 U. S. 360. The privilege of using the highways of a State by motor vehicles is not a privilege common to all United States citizens by virtue of such citizenship. *Slaughter House Cases,* 16 Wall. 36; *New Orleans Gas Co.* v. *La. Gas Co.,* 115 U. S. 650; *Blake* v. *McClung,* 172 U. S. 239; *Maxwell* v. *Dow,* 176 U. S. 581; *Twining* v. *New Jersey,* 211 U. S. 78; *Maxwell* v. *Bugbee,* 250 U. S. 525.

Mr. Chief Justice Taft delivered the opinion of the Court.

This case involves the validity, under the Fourteenth Amendment, of a statute of New Jersey providing for service of process on non-residents of the State in suits for injury by the negligent operation of automobiles on its highways.

Pizzutti was driving a team of horses attached to a wagon on a public highway in New Jersey. Wuchter was a resident of Pennsylvania who was following the wagon with his automobile. Wuchter drove his car so as to crash into the rear of the wagon, damaging it, and injuring Pizzutti and his horses. Pizzutti instituted a suit against Wuchter in the Supreme Court of New Jersey. Wuchter was served with process under the provisions of the Act known as Chapter 232 of the Laws of 1924, (P. L. 1924, p. 517) by leaving process with the Secretary of State. Wuchter interposed no defense. A judgment interlocutory was taken against him and a writ of inquiry of damages was issued. Although the statute did not

require it, notice of its proposed execution was actually served personally on Wuchter in Pennsylvania. Wuchter did not appear. A final judgment was entered. Wuchter then appealed to the court below, contending that the Act under which the process was served upon him was unconstitutional, because it deprived him of his property without due process of law, in contravention of section 1 of the Fourteenth Amendment to the Federal Constitution.

Section 1 of the Act complained of, under which the process was served in this case, was as follows:

"From and after the passage of this act any chauffeur, operator or owner of any motor vehicle, not licensed under the laws of the State of New Jersey, providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to nonresident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall, by such acceptance and the operation of such automobile within the State of New Jersey, make and constitute the Secretary of State of the State of New Jersey, his, her or their agent for the acceptance of process in any civil suit or proceeding by any resident of the State of New Jersey against such chauffeur, operator or the owner of such motor vehicle, arising out of or by reason of any accident or collision occurring within the State in which a motor vehicle operated by such chauffeur, or operator, or such motor vehicle is involved."

This is the first section of an Act entitled "An Act providing for the service of process in civil suits upon nonresident chauffeurs, operators, or nonresident owners whose motor vehicles are operated within the State of New Jersey, without being licensed under the provisions of the Laws of the State of New Jersey, providing for the registration and licensing of drivers and operators and

of motor vehicles, requiring the execution by them of a power of attorney to the Secretary of State of the State of New Jersey to accept civil process for them under certain conditions." The second section provides that where the car is unlicensed and there is an accident, the magistrate before whom the non-resident owner of such motor vehicle or its operator shall be brought shall require the non-resident as a condition to his release on bail or otherwise to execute a written power of attorney to the Secretary of State appointing such officer his lawful attorney for the acceptance of service in any civil suit instituted or to be instituted by any resident of the State of New Jersey against the non-resident for or on account of any claim arising out of the collision or accident.

Section 3 provides that it shall be lawful to serve civil process upon a non-resident owner in such case upon any chauffeur or operator of the vehicle while the vehicle is being operated within the state by such chauffeur or operator, and that such service may be lawfully served upon any non-resident owner by serving the process upon any person over the age of fourteen years who has custody of the automobile, whether held by him as security or driven, provided, however, that a copy of such civil process also shall be posted in a conspicuous place upon such automobile. The only provision for other than service on the persons in charge of the car is by leaving the summons with the Secretary of State without more, under § 1 of the Act already quoted.

By the general state motor law, as amended by Chapter 211, Laws of 1924, provision is made for the registration and license of automobiles owned by non-residents who use the highways of the state, P. L. 1924, § 9, par. 4, p. 451. They are required to agree that original process against the owner made by leaving it in the office of the Secretary of State shall have the same effect as if served on the owner within the state, and the statute

provides that the Commissioner of Motor Vehicles shall notify the owner of such motor car by letter directed to him at the post office address stated in his application for registration and license already filed with the Commissioner.

The Act first above referred to, No. 232, under which process in this case was served, applies to the owners of automobiles who are not licensed but who come into the state and use the highways of the state without registration and is not to be confused with the license act or its provisions.

It is settled by our decisions that a state's power to regulate the use of its highways extends to their use by non-residents as well as by residents. *Hendrick* v. *Maryland,* 235 U. S. 610, 622. We have further held that, in advance of the operation of a motor vehicle on its highways by a non-resident, a state may require him to take out a license and to appoint one of its officials as his agent, on whom process may be served in suits growing out of accidents in such operation. This was under the license act of New Jersey, last above referred to, and not No. 232. *Kane* v. *New Jersey,* 242 U. S. 160, 167. We have also recognized it to be a valid exercise of power by a state, because of its right to regulate the use of its highways by non-residents, to declare, without exacting a license, that the use of the highway by the non-resident may by statute be treated as the equivalent of the appointment by him of a state official as agent on whom process in such a case may be served. *Hess* v. *Pawloski,* 274 U. S. 352.

The question made in the present case is whether a statute, making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued. Section 232 of the Laws of 1924 makes no such requirement and we

have not been shown any provision in any applicable law of the State of New Jersey requiring such communication. We think that a law with the effect of this one should make a reasonable provision for such probable communication. We quite agree, and, indeed, have so held in the *Pawloski* case, that the act of a non-resident in using the highways of another state may properly be declared to be an agreement to accept service of summons in a suit growing out of the use of the highway by the owner of the automobile, but the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service on the Secretary of State or some officer of the state, without more, it will be entirely possible for a person injured to sue any non-resident he chooses, and through service upon the state official obtain a default judgment against a non-resident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud (*Heinemann* v. *Pier,* 110 Wis. 185) or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law. The Massachusetts statute considered in *Hess* v. *Pawloski,* really made necessary actual personal service to be evidenced by the written admission of the defendant. In *Kane* v. *New Jersey,* the service provided for by statute was by mail to the necessarily known registered address of the licensed defendant.

In determining the reasonableness of provision for service we should consider the situation of both parties. The person injured must find out to whom the offending auto-

mobile belongs. This may be a difficult task. It is easy when the owner of the automobile is present after the accident. That is provided for in the second section of this act by apprehending him or his operator. But the vehicle may be operated by someone who having committed the injury successfully escapes capture or identification. In such a case, the person injured must be left without a remedy by suit at law, as everyone must be who does not know or can not discover the person who injured him. The burden is necessarily on him to investigate and learn. In finding out who it was, and whether the person is of such financial responsibility as to warrant a suit, he almost necessarily will secure knowledge of his post office address or his place of residence, and thereby be enabled to point out how notice may be communicated to him. With this information at hand the state may properly authorize service to be made on one of its own officials, if it also requires that notice of that service shall be communicated to the person sued. Every statute of this kind, therefore, should require the plaintiff bringing the suit to show in the summons to be served the post office address or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant.

The cases, in which statutes have been upheld providing that non-resident corporations may properly be served by leaving a summons with a state official, where the corporation has not indicated a resident agent to be served, are not especially applicable to the present statute. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8. Such corporations may properly be required to accept service through a public officer as a condition of their doing business in the state. Their

knowledge of the statutory requirement may perhaps prompt frequent inquiry as to suits against them, of their appointed agent or at the office of the public official to be served, but it could hardly be fair or reasonable to require a non-resident individual owner of a motor vehicle who may use the state highways to make constant inquiry of the Secretary of State to learn whether he has been sued. Even in cases of non-resident corporations, it has been held that a statute directing service upon them by leaving process with a state official is void if it contains no provision requiring the official, upon whom the service may be made, to give the foreign corporations notice that suit has been brought and citation served. *Southern Railway Co.* v. *Simon,* 184 Fed. 959, 961; *Gouner* v. *Missouri Valley Bridge Co.,* 123 La. 964. In the latter case, the Louisiana court said in respect to such a law:

"This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued and give no notice whatever; not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicile. When a petition cannot legally be served on a defendant, the court can exercise no jurisdiction over him. The service defines the court's jurisdiction."

The question is mooted in *Simon* v. *Southern Railway,* 236 U. S. 115, 129, and the above language is quoted, but it was not found necessary to decide the point.

It is instructive in this matter to refer to state authorities to observe their view of what is valid in statutory provision for service upon proposed defendants, corporate or otherwise, where personal service can not be had. In *Nelson* v. *Chicago, Burlington & Quincy Railroad Co.,* 225 Ill. 197, the action was for personal injuries. The

statute provided that service could be had upon the president of a company at the place of business in the county, but that if there was no officer in the county, then the company might be notified by publication and mail in like manner and with like effect as is provided in the rules of chancery. Those rules required an affidavit showing the publication of a notice in a newspaper, and the mailing of the notice published. It was held that the service under the statute was valid as a reasonable one, for it was probable that the defendant would receive actual notice of the action before judgment was rendered against it.

In *Jefferson Fire Insurance Co.* v. *Brackin,* 140 Ga. 637, the statute provided that an action could be brought against an insurance company in the county in which the contract was made, out of which the cause of action arose, although there was no agent doing business in the county at the time. Also, that service of summons might be made by leaving a copy of the writ at the place of business of the agent at the time the cause of action accrued. The latter provision in the actual case was said to be lacking in due process for the reason that there was no reasonable probability that the company would receive notice in cases where there was no longer a place of business in the county.

In *Pinney* v. *Providence Loan & Investment Company,* 106 Wis. 396, the suit was by the grantee of a tax deed against the defendant corporation and another, as the former owners of the land, to bar their rights. The corporation was organized under the laws of the state and had its principal place of business in the county. The statute provided that corporations should file the names of officers upon whom service might be made, and that in all cases prior to the filing of such a list, service might be had by delivering and leaving with the register of deeds of the county where the corporation had its principal

place of business, a copy of the papers. Service in this case was had on the register of deeds accordingly. It was held that the statute was unconstitutional; that while the state might authorize constructive service on corporations, "the method adopted should be reasonably calculated to bring notice home to some of the officers or agents of the corporation, and thus secure an opportunity for being heard."

In *Town of Hinckley* v. *Kettle River R. R. Co.*, 70 Minn. 105, there was an action against the railroad company for the recovery of certain bonds or their value. The statute provided that when a corporation created by the laws of the state did not have an officer in the state upon whom legal service of process could be made, an action might be brought in a county where the cause of action arose or the corporation had property, and a service might be made by depositing a copy of the summons in the office of the secretary of state, which should be taken as a personal service on the corporation; provided that whenever any process was served on the secretary of state, the same should be by duplicate copies, one of which should be filed in the office of the secretary of state, and the other mailed by him immediately, postage prepaid, to the office of the company, or to the president, or secretary as found by the articles of incorporation on file in the office of the state official. It was held that the statute provided for due process, there being a necessity for providing for substituted service on domestic corporations, when their officers could not be found within the state, and that the method adopted was appropriate and likely to communicate actual notice of the commencement of the action to the corporation.

In *McDonald* v. *Mabee*, 243 U. S. 90, 91, a person domiciled in Texas left the state to make his home in another state. An action for money was begun by pub-

lication in a newspaper after his departure, and a judgment recovered and sustained by the state supreme court was held void by this Court. This Court said:

"The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. . . . No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. . . . And in states bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." See also *Roller* v. *Holly*, 176 U. S. 398.

These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here.

But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424, 425; *Louisville and Nashville R. R. Co.* v. *Stock Yards Company*, 212 U. S. 132, 144; *Central of Georgia Ry. Co.* v. *Wright*, 207 U. S. 127, 138; *Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333; *Roller* v. *Holly*, 176 U. S. 398, 409; *Stuart* v. *Palmer*,

74 N. Y. 183, 188; *Berryhill* v. *Sepp,* 106 Minn. 458. For these reasons, we think that the statute of New Jersey under consideration does not make provision for communication to the proposed defendant, such as to create reasonable probability that he would be made aware of the bringing of the suit.

Judgment reversed.

MR. JUSTICE BRANDEIS (with whom MR. JUSTICE HOLMES concurs), dissenting.

The rule of general law stated by the Court seems to me sound. But I think the judgment should be affirmed. The objection sustained by the Court—that the statute is void because it fails to provide that the Secretary of State shall notify the non-resident defendant—is an objection taken for the first time in this Court. It was not made or considered below; and it is not to be found in the assignments of error filed in this Court. The only objection made or considered below was that the state court lacked jurisdiction, because the defendant had not been personally served within the State. In other words, that while the State might require the defendant to appoint the Secretary of State as his agent to receive service, as held in *Kane* v. *New Jersey,* 242 U. S. 160, service without such appointment is bad. When the case at bar was decided below, the validity for that objection was an open question. Before the case was reached for argument in this Court, *Hess* v. *Pawloski,* 274 U. S. 352, settled that process other than personal service within the State may suffice to give jurisdiction over non-resident motorists. The objection now urged—that failure to prescribe the Secretary shall notify the non-resident denies due process—is an afterthought provoked by our decision in *Hess* v. *Pawloski.*

The nature of our jurisdiction under § 237 of the Judicial Code demands a rigorous adherance to the long estab-

lished practice that objections not raised or considered below cannot be relied on here. *National Bank* v. *Commonwealth,* 9 Wall. 353, 363; *Edwards* v *Elliott,* 21 Wall. 532, 557; *Bolln* v. *Nebraska,* 176 U. S. 83, 89; *Detroit, Fort Wayne & Belle Isle Ry.* v. *Osborn,* 189 U. S. 383, 390–391; *Cox* v. *Texas,* 202 U. S. 446, 451; *Haire* v. *Rice,* 204 U. S. 291, 301. It is immaterial that Wuchter made a general objection that the statute violated the due process clause. Compare *Wilson* v. *McNamee,* 102 U. S. 572; *Dewey* v. *Des Moines,* 173 U. S. 193, 197–201; *Bullen* v. *Wisconsin,* 240 U. S. 625, 632. The wisdom of that rule of practice is illustrated by what has happened in the case at bar. The reversal rests wholly upon a construction given to the New Jersey statute by this Court. It construes the statute as not requiring the Secretary of State to give notice to the defendant. Whether the Court of Errors and Appeals would have so construed the statute is at least doubtful. Had the objection been made there, it is possible—and indeed probable—that the highest court of New Jersey would have construed the statute as requiring the notice. Its able opinion shows that it appreciates fully the requirements of the due process clause. See also *Redzina* v. *Provident Institution for Savings,* 96 N. J. Eq. 346.

For aught that appears, it may have been the uniform practice of the Secretary to give notice whenever the address of the defendant was ascertainable. Such an administrative construction would carry great weight with the courts of New Jersey, *State* v. *Kelsey,* 44 N. J. L. 1; *Stephens* v. *Civil Service Commission,* 101 N. J. L. 192, 194, as it would with this Court. *United States* v. *Cerecedo Hermanos y Compania,* 209 U. S. 337. Moreover, the rule that a construction which raises a serious doubt as to the constitutionality of a statute will not be adopted if some other construction is open, is a rule commonly acted upon by the courts of New Jersey, *Colwell* v. *May's*

Landing Water & Power Co., 19 N. J. Eq. 245, 249; *Atlantic City Water Works Co.* v. *Consumers Water Co.*, 44 N. J. Eq. 427, 437; *State* v. *Tachin*, 92 N. J. L. 269, 274, as it is in this Court. *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217; *Arkansas Natural Gas Co.* v. *Railroad Commission*, 261 U. S. 379, 383; *South Utah Mines* v. *Beaver County*, 262 U. S. 325, 331; *Matthew Addy Co.* v. *United States*, 264 U. S. 239, 245; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 389–390; *Lewellyn* v. *Frick*, 268 U. S. 238, 251; *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393. Compare *Presser* v. *Illinois*, 116 U. S. 252, 268; *Hooper* v. *California*, 155 U. S. 648, 657; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546. As was said in *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 369: "We ought not to indulge the presumption either that the legislature intended to exceed the limits imposed upon state action by the Federal Constitution, or that the courts of the State will so interpret the legislation as to lead to that result." See also *Chicago, Terre Haute & Southeastern Ry. Co.* v. *Anderson*, 242 U. S. 283, 287.

While this Court has power to construe the statute, it is not obliged to do so. We have often recognized the propriety of remanding a case to a state court for the determination of a delicate question of state law. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503, 506; *Dorchy* v. *Kansas*, 264 U. S. 286, 291; *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Commission*, 273 U. S. 126, 131; *Cobb Brick Co.* v. *Lindsay*, 275 U. S. 491. If the judgment is to be reversed, it should be specifically for the purpose of enabling the Court of Errors and Appeals to pass upon the objection first raised by the defendant in this Court.

In the case at bar, the objection is not lack of jurisdiction, but denial of due process because the statute did not require the Secretary to notify the non-resident defend-

ant. Notice was in fact given. And it was admitted at the bar that the defendant had, at all times, actual knowledge and the opportunity to defend. The cases cited by the Court as holding that he could deliberately disregard that notice and opportunity and yet insist upon a defect in the statute as drawn, although he was in no way prejudiced thereby, seem hardly reconcilable with a long line of authorities. *Louisville & Nashville R. R. Co.* v. *Schmidt,* 177 U. S. 230, 238–239; *Simon* v. *Craft,* 182 U. S. 427, 436–437; *Harris* v. *Balk,* 198 U. S. 215, 227–228; *Baltimore & Ohio R. R. Co.* v. *Hostetter,* 240 U. S. 620; *Aikens* v. *Kingsbury,* 247 U. S. 484, 489. For the reasons stated, I do not need to attempt to reconcile them.

MR. JUSTICE STONE, dissenting.

I agree that the judgment should be reversed and the cause remanded, but with leave to the state court to determine whether the notice given to the plaintiff in error by the Secretary of State was required by the statute.

LINSTEAD, EXECUTRIX, *v.* CHESAPEAKE & OHIO RAILWAY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 171. Submitted January 11, 1928.—Decided February 20, 1928.

Train crews of the Big Four Railroad, operating under a reciprocal arrangement for freight exchange between it and the C. & O. Railroad, ran Big Four locomotives and cabooses from the common terminal over a twelve-mile stretch of C. & O. track, on which were several stations, to a point on the C. & O. where they picked up trains of freight cars destined for the Big Four and returned with them to its line. Though the men were paid by the Big Four and subject to discharge or suspension only by it, the traffic was C. & O. traffic, paid for under its tariffs, and the work was done under the rules of that railroad and under the immediate supervision of its trainmaster.

Held that a member of such a crew, injured while so engaged, was *pro hac vice* an employee of the C. & O. Railroad, within the Employers' Liability Act. P. 32.
14 F. (2d) 1021, reversed.

CERTIORARI, 273 U. S. 690, to a judgment of the Circuit Court of Appeals, reversing a judgment recovered by the above-named petitioner in an action under the Federal Employers' Liability Act, for the death of her husband in an accident on the Chesapeake & Ohio Railway.

Mr. John W. Cowell was on the brief for petitioner.

Mr. Frank M. Tracy was on the brief for respondent.

Linstead was not an employee of The Chesapeake & Ohio Railway Company within the meaning of the Federal Employers' Liability Act. *Hull* v. *Philadelphia & Reading Rwy.*, 252 U. S. 475; *Wagner* v. *C. & A. R. R.*, 265 Ill. 250; *M. K. & T. Rwy.* v. *West*, 38 Okla. 581; *M. K. & T. Rwy.* v. *Blalack*, 105 Tex. 296; *Drago* v. *Central R. R.*, 93 N. J. L. 176.

The case at bar can not be distinguished from the *Hull* case, either upon the ground that the Big Four did not retain control over Linstead after he went upon the lines of the Chesapeake and Ohio Railway Company, or upon the ground that Linstead, when on the lines of the Chesapeake and Ohio Railway Company, was doing the work of that Company and not work of the Big Four Company.

Linstead's service was for his own company, as was Hull's. In each case the employee is subject to the rules and regulations of the connecting carrier when on its lines.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was an action under the Federal Employers' Liability Act against the Chesapeake and Ohio Railway Com-

pany, of Virginia, by Katherine Linstead, as executrix, to recover damages for the death of her husband, who was a conductor in the employ of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, known as the Big Four, but who was working upon a freight train running upon the Chesapeake & Ohio Railway Company's tracks between Stevens, Kentucky, and Riverside, Ohio, near Cincinnati. The question in the case is, for whom he was working when he was killed, whether for the Chesapeake & Ohio Railway Company, the respondent, or the Big Four Company. He was one of a train crew of the Big Four Company composed of an engineer, a conductor and two brakemen. The Chesapeake & Ohio Company comes from the east to Cincinnati along the southern bank of the Ohio River and crosses that river at Cincinnati. The Big Four Company has no line in Kentucky but receives traffic and business from the Chesapeake & Ohio Company at Cincinnati, or near thereto on the north side of the river, delivering the traffic to the northwest. The terminal yard, so-called, of the Chesapeake & Ohio reaches from a station called Stevens, in Kentucky, for some twelve or thirteen miles to Riverside, near Cincinnati on the Ohio side, and in this twelve or thirteen miles the Chesapeake & Ohio line passes five stations, called Brent, Altamont, Newport Waterworks, Brick House and Cold Haven, and over an Ohio River bridge. It is convenient for both railroads in the interchange of traffic to make an arrangement by which the Big Four lends to the Chesapeake & Ohio a locomotive and caboose and a train crew to take the freight trains that come into Stevens, Kentucky, from the east to the Big Four Company at Riverside, Ohio, over the rails of the Chesapeake & Ohio. The Chesapeake & Ohio does not pay the Big Four Company any rental for the lending of its locomotive and caboose and crew in this matter, but it pays the consideration by a reciprocal service rendered to the Big Four by a train

crew and locomotive and caboose of the Chesapeake & Ohio. When the Big Four train crew and locomotive and caboose run on the track of the Chesapeake & Ohio between Stevens and Riverside, near Cincinnati, they are furnished with time-tables and rule books of the Chesapeake & Ohio Railway. They are under the supervision and control, so far as their work is concerned, of the train master of the Chesapeake & Ohio Company, whose jurisdiction reaches from Stevens to Riverside in the operation of the Chesapeake & Ohio road. The Big Four crew is not subject to discharge by any officer of the Chesapeake & Ohio road. In the operation of the train over the Chesapeake & Ohio line, they obey the signals of the switch tenders of that company and comply with the rules for operation on its line. The Big Four crew attends to nothing while on the Chesapeake & Ohio line but the train which it is sent over to Stevens to bring to the junction point at Riverside on the Ohio side. All of the members of the train crew, including the deceased, were paid by the Big Four Company.

On the morning of the accident, Linstead, the deceased, as conductor, had brought over his crew with the Big Four locomotive and caboose to Stevens, had attached the locomotive and caboose to a train of cars containing twenty-two loads and eighteen empties, and was proceeding to take them to Cincinnati and the junction with the Big Four load. The train had proceeded only a few miles on the Chesapeake & Ohio track when it was overtaken and run into by a commutation passenger train of the Chesapeake & Ohio Company running from Stevens to Cincinnati and back again. It was a train operated by the Chesapeake & Ohio Railway for the convenience of early morning passengers, and was not on the time-table. It was called the "Chippy." Linstead was in the caboose at the rear of his freight train. The caboose was shattered to pieces and Linstead was killed.

The trial was had in the District Court in Kentucky, held at Covington, and in the charge the Court used this language, which was duly excepted to:

"First, under the evidence here, you are authorized to believe, you couldn't find otherwise, that the Chesapeake and Ohio Railway is a common carrier engaged in interstate commerce, carrying freight and passengers between the states.

"Second, under the evidence you would be authorized to find, you couldn't find otherwise, that the defendant, her husband, on the occasion of the injury was in the employ of the Chesapeake & Ohio Railway Company and engaged in interstate commerce work."

The result of the trial was a verdict for $16,500, upon which judgment was entered.

By writ of error, the case was carried to the Circuit Court of Appeals. That Court, by *per curiam,* reversed the judgment and remanded the case for further proceedings. The language of the Court was:

"We are unable effectively to distinguish the facts of this case from those of *Hull* v. *Philadelphia, etc., Ry.,* 252 U. S. 475,—an opinion which apparently was not brought to the attention of the trial court." The judgment of the Circuit Court of Appeals was brought here by certiorari. 273 U. S. 690.

The legal consequences of the relation between one in the general service of another who is in the special service of a third person are set forth in the case of the *Standard Oil Company* v. *Anderson,* 212 U. S. 215, 221. In that case the plaintiff was employed as a longshoreman by a master stevedore, who under contract with the defendant was engaged in loading a ship. The plaintiff was working in the hold, where, without fault on his part, he was struck and injured by a draft or load of cases containing oil, which was unexpectedly lowered from a winch, and the question presented was whether the winchman whose negligence

probably produced the injury was the servant of the owner of the ship or of the stevedore. After reference to the opinion of Chief Justice Shaw in the case of *Farwell* v. *Boston & Worcester Railroad Corporation,* 4 Metcalf, 49, this Court said that the master was answerable for the wrongs of his servant, not because he had authorized them nor because the servant in his negligent conduct represented the master, but because he was conducting the master's affairs, and the master was bound to see that his affairs were so conducted that others were not injured, and that this principle rested on the great principle of social duty adopted from general considerations of policy and security. The opinion continues:

"The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it.

"It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men became *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is

done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary coöperation, where the work furnished is part of a larger undertaking."

Now the work which was being done here by Linstead and his crew was the work of the Chesapeake & Ohio Railway. It was the transportation of cars, loaded and empty, on the Chesapeake & Ohio Railway between Stevens and Cincinnati. It was work for which the Chesapeake and Ohio road was paid according to the tariff approved by the Interstate Commerce Commission; it was work done under the rules adopted by the Chesapeake & Ohio Railway Company; and it was done under the immediate supervision and direction of the trainmaster in charge of the trains running from Stevens to Cincinnati, and that trainmaster was a superior employee of the Chesapeake & Ohio road. We do not think that the fact that the Big Four road paid the wages of Linstead and his crew or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job.

The case of *Hull* v. *Philadelphia & Reading Railway Company*, 252 U. S. 475, which controlled the view of the Circuit Court of Appeals, is to be distinguished from this. In that case, Hull, the plaintiff's deceased, was in the employ of the Western Maryland Railway Company as a brakeman and was killed. The Western Maryland Company was an interstate carrier operating a railway from Hagerstown, Maryland, to Lurgan, Pennsylvania,

at which point it connected with a railway owned and operated by the defendant, the Philadelphia & Reading Railway Company, which extended from Lurgan to Rutherford in Pennsylvania. By arrangement between the two companies, through freight trains were operated from Hagerstown to Rutherford, one-half over one line, and one-half over the other, and each company ran its own locomotives and freight trains over the united line from Hagerstown to Rutherford, observing the rules of each company on its respective line. It was held that Hull was not a servant of the Philadelphia & Reading Company, by which he was killed, but only the servant of the Western Maryland Company. That was because the work which Hull was doing was the work of the Western Maryland Company, even though it was carried on for a part of the way over the rails of the Philadelphia & Reading Company. The locomotive belonged to the Western Maryland Company, the cars belonged to the Western Maryland Company and the loads that were carried were being carried for the Western Maryland Company, and presumably the rates which were received for the transportation were the receipts of the Western Maryland Company. In other words, the whole line between Hagerstown and Rutherford was exactly as if it had been jointly owned by the two companies, and jointly used by them for their freight trains. Therefore the work was done by the Western Maryland for itself and the mere transfer of the train owned by the Western Maryland and operated by it on to the rails of the Philadelphia & Reading Railway did not transfer the relation of the deceased from the general employment of the Western Maryland to a special employment by the Philadelphia and Reading as another master.

In the present case there was such a transfer and the line over which the transportation was effected and on which the work of transportation was done by the de-

ceased was the line of the Chesapeake & Ohio, which was master and remained in charge of the operation, with the immediate supervision of the Big Four crew which was lent for the very purpose of doing the work of the Chesapeake & Ohio.

For these reasons, the judgment of the Circuit Court of Appeals must be reversed and the judgment of the District Court of Kentucky restored.

Reversed.

HARKIN ET AL., RECEIVERS, *v.* BRUNDAGE, RECEIVER, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 117. Argued December 5, 6, 1927.—Decided February 20, 1928.

1. As between two courts of concurrent and coördinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by the filing of a bill is entitled to retain it without interference and can not be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill, it is the date of the actual possession of the receiver that determines the priority of jurisdiction. P. 43.
2. A stockholders' suit having been brought in a state court to protect the assets of a corporation from wasteful and dishonest management and to restore them, when in safe condition, to the corporation after election of a new management, the attorney for the corporation fraudulently procured a postponement of a motion for receivers by agreeing in the state court that nothing would be done in the interim to affect the *status quo*, the real intention being to secure a prior receivership in the federal court. To this end, during the continuance, a collusive creditors' suit was begun against the corporation by a non-resident, a receiver was appointed with the corporation's consent, the bill, answer and consent being filed simultaneously, and the receiver took custody of the corporate property.

Soon afterwards, receivers appointed by the state court, explaining the facts to the federal court, applied for a surrender of the property, which was denied, although the parties there at that time were limited to the corporation and the plaintiff, both charged with knowledge of the fraud, and although, due to the insolvency of the corporation, the proceeding in the state court could by amendment have been given the effect of a creditors' bill. The federal court proceeded to administer the corporate estate, receiver's receipts were issued and paid, some of the property was sold, some distribution made to creditors, and the rights of innocent creditors who had become parties were involved. *Held*:

(1) The means by which the state court was induced to delay exercise of its jurisdiction to appoint receivers and the failure to reveal the facts to the federal court, constituted a fraud on both courts. P. 56.

(2) Vindication of the cause of comity and good faith as between the two courts should not be limited to punitive proceedings against the lawyer whose pledge to the state court was broken. P. 54.

(3) Although the difference in character between the two suits as brought was such as to have enabled the federal court to retain jurisdiction of the property but for the fraud, when it learned of the fraud, the parties before it being both guilty, it was bound in good faith and comity to accord the state court an opportunity to exercise its jurisdiction, even to the taking of the property. P. 56.

(4) Notwithstanding the subsequent change of situation, through the administration of the estate in the federal court and the introduction of innocent parties, comity still required that the federal court, after paying reasonable compensation to its officers for work done by them, should surrender the property still in its custody to the state court receivers, but on condition that that court first confirm all that was done in the sale, disposition and distribution of assets as though done by its own decree, and so shape its pleadings, etc., that the case in that court might proceed, as a creditors' bill, to a liquidation of all debts and distribution of remaining assets. P. 57.

(5) Failing the making of such an order by the state court and its production in the federal court in a seasonable time, the pending administration in the federal court should continue. P. 58.

3. As a general rule, a creditors' bill can be brought only by a judgment creditor after a return of *nulla bona*. P. 52.
4. When a receiver has been irregularly appointed in a suit by a simple contract creditor with consent of the defendant, and the

administration has proceeded so far that it would be detrimental to all concerned to discharge the receiver, the receivership has been permitted to continue because not seasonably objected to. P. 52.

5. A receiver is an officer of the court, and should be as free from "friendliness" to any party as should the court itself. P. 55.

6. A conclusion of fact made by the District Court upon hearing the witnesses, will not be accepted here when the agreed stenographic report and other circumstances in the case show it to be clearly erroneous. P. 53.

13 F. (2d) 617, reversed.

CERTIORARI, 273 U. S. 682, to a decree of the Circuit Court of Appeals affirming an order of the District Court, which denied an application by the petitioners here for surrender into their custody, as receivers appointed by a state court, of property in the custody of the respondent, as receiver appointed by the District Court. See *post*, p. 604.

Mr. Lloyd C. Whitman, with whom *Mr. Bernhardt Frank* was on the brief, for petitioners.

Mr. Edward R. Johnston, with whom *Messrs. Ralph F. Potter* and *Henry J. Darby* were on the brief, for respondents.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This case presents a controversy between state court receivers and the receiver of a federal court over the possession of the property and assets of the Daniel Boone Woolen Mills Corporation. It is here by certiorari to the judgment of the Circuit Court of Appeals for the Seventh Circuit affirming a decree of the district court for the Northern District of Illinois. The receivers in the state court were appointed on the prayer of what was called a stockholder's bill. The receiver in the federal court was appointed on the prayer of what was called a creditor's bill. The receiver in the federal court was appointed

first; but the bill in equity upon which the state court receivers were appointed was filed five days before the bill in the federal court. The receivers in the state court filed a motion in the federal court requesting that the property in the hands of the federal court receiver be transferred to the state court receivers, on the ground that the state court by the earlier filing of the bill in that court had acquired constructive possession and its receivers were entitled therefore to actual possession of the property.

The Daniel Boone Woolen Mills was a corporation of the State of Illinois engaged in the manufacture of woolen cloth in Illinois with its principal place of business there but with additional plants in other states. It had 187,000 shares of stock owned by 1,500 individual stockholders resident in many states. It had been so badly managed during the year 1924, and its indebtedness had been so much increased that a surplus of $500,000 had been changed into a deficit of more than $2,000,000. Nevertheless, at the end of 1924, it was alleged by all parties that its assets exceeded its liabilities by $1,000,000, although the event has proved the fact to be otherwise and administration under receivership shows the debts much to exceed its assets. The mismanagement had led its president and its treasurer, both named Gumbinski, to resign, and they were replaced by Joseph Byfield as president, and Frank Solomon as vice-president. These two officials had not been able to secure the financial support necessary to meet the expenditures and conduct the business. On February 14th, 1925, therefore, Harry Hurwitz, a stockholder of the company, filed a bill in the Superior Court of Cook County, Illinois, in his own behalf and in that of all other stockholders of the corporation, "and all other firms or corporations who might be interested in the litigation, and who might seek to intervene or contribute to the expense thereof."

The averment of the bill was that during 1924 those in control had used for their own purposes the assets of the corporation, and it became the duty of the new officers to bring suit to recover the property thus abstracted, embezzled or wasted, but that nothing had been done. It averred the solvency of the company, but alleged that it was not able to pay its current expenses, that the business ought to be maintained and conducted in order to make up in salable form a great deal of material on hand uncompleted, and that in order to save the property in the interest of the stockholders and others, a receiver should be appointed who should continue the business. The prayer was for an injunction forbidding those engaged in the management from imposing any lien or mortgage on the property. In effect the bill asked for the appointment of receivers with authority to take possession of the property, carry on the business, and subsequently, after getting the property into proper condition, to provide for and call a stockholders' meeting and a transfer of the property back to a new management.

On the 19th of February, five days later, a bill was filed in the United States district court for the Northern District of Illinois by the United States Worsted Sales Company, a corporation of the State of New York, claiming to be a simple non-judgment creditor of the Woolen Mills in the sum of $6,000. The plaintiff brought the bill on its own behalf and on behalf of all the creditors of the Woolen Mills who would join in the prosecution. Its averments in respect to ownership and the disastrous operation of the company were much the same as those of the bill by Hurwitz in the state court. It specifically averred that the Woolen Mills was not insolvent but that it had been impossible to secure money with which to carry it on, that there was grave danger of the recovery of judgments and the levy of executions, and of a race for undue preferences, and that in the preservation of the property it was

necessary to appoint a receiver to continue the business, make up the uncompleted material and then to dispose of the property as the court might deem wise, by sale or otherwise, in the interest of all the creditors and of the stockholders. It asked authority for the receiver to apply in either federal or state courts of other states, in which the various factories of the Woolen Mills were situate, for ancillary receiverships. It further asked an injunction against judgments and executions of all creditors and an order requiring them to file their claims with the receiver.

Application for receivers in the state court in the Hurwitz suit had been made upon the filing of the bill, and notice given to the defendant Woolen Mills that the motion would be presented on February 16, 1925, the bill having been filed February 14th. Upon application of one Cowan, the attorney for the Woolen Mills corporation, the hearing on the motion for a receivership on the 16th was postponed until February 21st, and meantime the bill in the federal court for a receiver was filed on February 19. On the same day the Woolen Mills Corporation entered its appearance in the district court, filed its answer admitting the averments of the bill and consented to the appointment of a receiver. The appointment of Brundage as receiver was made on the following day.

On the 25th of February, the Superior Court of Cook County entered an order allowing one Max Goldenberg, a stockholder, to file in the Hurwitz suit his intervening petition, which did not in effect change the nature of the relief asked, but elaborated a description of details of the conspiracy of the Gumbinskis to loot the Woolen Mills Company, and of a conspiracy of the Woolen Mills management to evade the jurisdiction of the state court by delay in the appointment of receivers there and by the collusive answer and consent of the Woolen Mills to the

appointment of a federal court receiver. This intervening petition was adopted on March 13th by Hurwitz as an amendment to his original bill. On February 28th, the Superior Court entered its order appointing the Union Bank and Harkin as receivers of the property. In that order the Superior Court found that it had had jurisdiction of the subject matter and the parties and it empowered its receivers to prosecute and defend without further order all existing actions by or against the Woolen Mills Corporation, and enjoined the corporation, its officers and directors, from encumbering or pledging or creating any liens against the property, moneys, accounts and assets of the Woolen Mills Corporation during the receivership. On March 13th the state court receivers filed a motion in the district court in this cause setting forth their appointment as receivers in the state court and the history of the litigation, charged that the district court was without jurisdiction to appoint a receiver of the Woolen Mills Corporation or of its property, assets or records, and prayed for an order upon Brundage, as its receiver, to turn over this property now in his possession to them.

The question mainly argued in the district court and in the Circuit Court of Appeals and here was whether the state court, solely by the filing of a stockholder's bill for the appointment of a receiver, obtained constructive possession of the property and assets of the Woolen Mills Corporation. Upon this motion, evidence was taken disclosing at length the circumstances of the postponement in the state court, the filing of the bill in the federal court and the appointment of the receivers there. Of these we shall hereafter consider the effect. The district court held that the controversy in the federal court was different from that in the state court as shown by a comparison of the two bills; that the bill in the federal court was a creditor's bill, whereas that in the state court was

a stockholder's bill; that the interests of the creditors were prior and necessarily underlay those of the stockholders, and that the stockholder's bill in the state court would have been ineffective because in such a case the court had no power to enjoin creditors from judgment and execution against the assets, whereas the jurisdiction in the creditor's bill gave power to preserve by injunction the estate and thus prevent undue preference among creditors. It was therefore concluded that the creditor who brought the bill was entitled to the receiver as prayed, and that the appointment of the receiver gave the federal court jurisdiction which the state court receivers could not be permitted to disturb.

The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this Court. As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and can not be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill, it is the date of the actual possession of the receiver that determines the priority of jurisdiction. *Moran* v. *Sturges,* 154 U. S. 256, 283, 284; *Palmer* v. *Texas,* 212 U. S. 118; *Wabash Railroad* v. *Adelbert College,* 208 U. S. 38, 54; *Farmers' Loan and Trust Company* v. *Lake Street Railroad Company,* 177 U. S. 51, 61; and *Adams* v. *Mercantile Trust Company,* 66 Fed. 617. The difficulty in the application of the rule is in determining whether the conflicting jurisdictions are actually concurrent and the same. A doubtful question, too, is whether the bill is of such a

character that its filing is the taking of constructive possession of the property.

In *Palmer* v. *Texas*, the suit in the state court was an action by the State to forfeit the charter of the corporation and wind up its affairs. The suit in the United States court was an action by a stockholder to liquidate the corporation. Both were substantially alike in purpose. The state court had proceeded so far as to appoint receivers of the property and had merely delayed their taking possession until the case might be examined on appeal in the court above. The state court was held to be in constructive possession all the time, and was given priority of jurisdiction over the property as against the receivers of a federal court who had taken actual possession under a subsequent bill.

In *Farmers' Loan and Trust Company* v. *Lake Street Railroad Company*, the suit in the federal court was an action to foreclose a mortgage, and the one in the state court sought to enjoin the foreclosure. In that case the controversies were held to be substantially the same, and the filing of the bill in foreclosure in the federal court was held to be a constructive possession of the property.

In *Moran* v. *Sturges*, on the other hand, the controversy was between the jurisdiction of a state court in winding up a corporation and the distribution of its assets, which included navigable vessels, and the jurisdiction of the federal court, which had taken actual possession of the vessels, to enforce the collection of maritime liens on them. It was held that as the state court had no capacity to take jurisdiction of the maritime liens and enforce them, there was not concurrent jurisdiction, and therefore the court which first obtained actual possession of the vessels by its receiver was entitled to retain it without interference.

In *Empire Trust Company* v. *Brooks*, 232 Fed. 641, a suit was pending in the state court for the dissolution of a

corporation and the distribution of its assets under a state statute, but it had made no order appointing a receiver and had not taken actual possession of the property at the time the suit was brought. A subsequent suit was brought against the corporation in the federal court to foreclose a mortgage upon the property and a receiver was appointed who took possession of the property and it was held in a carefully reasoned opinion that the federal court by receivership had acquired priority of jurisdiction with respect to the property mortgaged, on the ground that the issues and subject matter of the two suits were not essentially the same and that there was no conflict of jurisdiction. See also *De La Vergne Refrigerating Machine Company* v. *Palmetto Brewing Company*, 72 Fed. 579, 584, 585.

We conclude that if the decision of this motion turned on the question of priority of jurisdiction on the face of the two bills, it could not be said that the courts were exercising concurrent jurisdiction. The creditor's bill conferred on the court the power to enjoin the judgments and executions of creditors and the establishment of undue preferences among the creditors, whereas in the stockholder's bill no such remedy was asked and could hardly be afforded without amendment and further allegation and prayer. Of course, as it has now turned out, because the corporation has proven to be insolvent, it would not have been difficult or be difficult now in the state court bill, by an amendment, to give the stockholder's bill the effect of a creditor's bill, with the receivers in possession. Indeed it would seem to be its duty to do so.

These considerations based upon the face of the pleadings in both actions would have justified the conclusions reached in the district court and in the Circuit Court of Appeals were it not that the evidence submitted by the receivers of the state court upon the motion here under consideration discloses a fraud upon the state court by which the appointment of receivers therein was delayed in order that the federal receiver could be appointed.

There were two parties among the stockholders in the Boone Mills Corporation. Gumbinski and his associates had been ousted in November, 1924, because of charges made public against them of concealment and defalcation and mismanagement. It became a subject of newspaper comment and of great publicity because of the large number of stockholders and the wide distribution of the shares. Byfield and Solomon, who, as already said, had been made in November, 1924, president and vice-president, controlled the majority of the stock. Hurwitz as a stockholder, acting for the minority stockholders, filed the stockholder's bill and made the application for receivers to the Superior Court of Cook County. The application much affected the credit of the corporation, and it was regarded between the stockholders as an important question who should be receiver and by what court he should be appointed.

Mr. Cowan was one of a firm of lawyers that acted for the defendant the Woolen Mills Corporation, and was himself a member of the executive committee of the board of directors of that company. Mr. Byfield admits that he talked with Mr. Cowan sometime before and had expressed his opposition to anything but a federal receivership. The application for a receiver in the state court on the stockholder's bill was set for February 16, 1925. When the motion was called on that day, what followed is recited in the record as agreed upon by the parties. We have inserted it in the margin.*

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* Mr. Gesas: If the court please, this is a Bill filed by a stockholder, seeking the appointment of a receiver, for the Boone Woolen Mills, Inc. A notice was served on the company and Mr. Cowan, who appears here this morning, advises me that the company desires a continuance.

Mr. Cowan: The situation, if the court please, is this, without going into the merits of the bill, whether or not the bill sets up such

An examination of the evidence following this postponement, much of which had to be drawn from the Byfield party and their attorneys, satisfies us that the facts were as follows:

The delay in hearing the motion for a receiver in the state court was procured by Mr. Cowan, the attorney for

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grounds as would warrant this court in entering a receivership; there are certain important matters now coming before the Board of Directors of this company, which involves some very large amount of finances, and which will be seriously interfered with, if this court undertakes to hear the application, for a receivership. I think those negotiations will be concluded, within a week, and the rights of the complainant, under this bill, will not be affected in any way at all, by allowing this matter to go over for a matter of a week or ten days. I would prefer not to argue the motion this morning, but if counsel insists upon it, of course it will be necessary for me to do it.

Mr. Gesas: I think the first thing the record should disclose is whether or not these gentlemen are appearing here for the company; there is no appearance on file.

The Court: Yes, that is right.

Mr. Gesas: I appear here for the complainant.

Mr. Cowan: I appear for the company, and will file my appearance in due time.

Mr. Gesas: In your individual capacity?

Mr. Cowan: The firm of Barrett and Barrett, with which I am associated.

Mr. Gesas: Now, if the court please, in this matter, without going into the full matters, there has been a considerable fight, as your Honor happens to see, from this photographic newspaper, in which it is a fight between the former directors against the present directors and the present directors against the former directors—

The Court: And their compliments were passed back and forth?

Mr. Gesas: Yes, if the court please, and there has been a loss of over three million dollars in one year in the operation of this business, which practically has been neglected on account of no action taken by these directors, and if any continuance is granted here at all it must be—well, I think the court has a right to hear this matter; that the issues, if any at all are involved, should be tried by this court, not the newspapers, so that the good-will which the stockholders have in this business, and the value of that good-will, if there

the Boone Mills Corporation, for the purpose, if possible, of securing the appointment of a receiver in the federal court. One Grand was a stockholder of the corporation and lived in St. Louis, and represented other stockholders, all of whom were of the Byfield party. As soon as the motion was continued in the state court, a conference was held between Cowan, Byfield and Solomon. It has been said that this conference was to be held with a view of securing money to carry on the corporation, and that this was the reason for asking the delay in the state court. But we think the evidence of Mr. Solomon shows clearly that the conference was for the purpose of seeing whether

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is any left after this terrible fight, between the old directors and the new directors, should be placed in status quo, and if there is any continuance granted, I think it ought to be done with the understanding that the status will not be changed, and that the issues be not tried in the newspapers, but by this court.

The Court: Yes, but of course, I can not control the newspapers, you understand.

Mr. Gesas: Your Honor can control the status quo.

The Court: Yes, with that understanding, but the suggestion that individuals should not seek publicity, of course,—

Mr. Gesas: The situation is this—

Mr. Cowan: Just a minute. Mr. Gesas complains about trying the case in the newspapers; one of the parties, who is charged with fraud in this bill, published half a page of an advertisement, and it was paid for, I assume, by—

Mr. Gesas: Here it is.

Mr. Cowan: (Continuing)—that is something over which we have no control, and which we didn't mail; there has been a two million dollar libel suit against the present President of the company, so that I don't think we could be charged with trying our case in the newspapers.

Mr. Gesas: I am not making any direct charge, at this moment, as to either the present directors or the former directors, as to their activities, except to say that both are guilty of seeking this publicity.

Mr. Cowan: Now, the question of publicity—

Mr. Gesas: Just a minute. May I suggest, if the court please, there is a considerable emergency in this way; from what I under-

a receivership in the federal court could be secured in advance of the probable appointment in the state court.

Mr. Cowan telephoned to Mr. Grand to come to his office with the expectation that because of his diverse citizenship he could file a stockholder's bill in the federal court. Grand suggested that a law firm of which Stern and Johnson were members should be selected. One of that firm, either Mr. Stern or Mr. Johnson, expressed the opinion that instead of a stockholder's bill a creditor's bill should be filed, because on such a bill they were more

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stand a form letter was sent out by the present President, in which he advises the stockholders of the terrible condition he finds the company in, at the present time, with the payroll and other expenses which run about one hundred thousand dollars a week; that any great delay in this matter is going to be very harmful to the rights of the parties; of course, we are willing to grant a reasonable continuance, and if this matter goes over to about Friday or Saturday of this week, I should imagine that ought to be a reasonable time, and not have a continuance for one week or ten days. We are here to ascertain our status—

Mr. Cowan: I have no objection to its going over to Friday or Saturday, but personally I think if you let it go until Monday—

The Court: There is no court Monday; that is what the Clerk tells me. You see Washington's Birthday is on the twenty-second, and we observe it on the twenty-third, the day following.

Mr. Cowan: Saturday morning, all right.

Mr. Gesas: Saturday morning and everything remains in status quo?

The Court: Yes. Saturday morning, without further notice.

Mr. Gesas: And any notices, or affidavits that you are going to present—

The Court: Yes, have them served on the other side, naturally, either side.

Mr. Cowan: All right, Saturday morning.

The Court: Yes.

Which were all the proceedings had in the above entitled cause, on this date.

Signed and sworn to by the Court Reporter, Cleary.

likely to get the receivership. Then the question arose who should be made the plaintiff, Grand, the St. Louis stockholder, not filling the requirement in such a suit. Cowan and others, with vice-president Solomon, examined the list of creditors of the company to see who could be induced to bring the creditor's bill. It was found that one Philipson, who was the agent of the United States Worsted Sales Company, a corporation and citizen of New York, had a claim for $6,000, and also that Stern was a personal friend of the agent. Accordingly, Solomon asked Philipson to turn his claim over to Stern for the protection of the company and creditors and stockholders of the Boone Mills Corporation, saying that the purpose of having a receiver appointed in the federal court was to prevent the appointment of a receiver in the state court. Philipson replied that he would be willing to do so provided he got the consent of his home office. The statement was made to him "somewhere along the road" that there would be no expense involved to Philipson's company. Philipson telephoned his company and got their consent. Then Mr. Johnson, the partner of Mr. Stern, drafted the bill in accordance with such information as he says he had had for thirty days and such information as he obtained from Cowan and the other men who were interested. The bill was filed. The answer of the company on the authority of its directors admitting all the facts and consenting to the appointment of a receiver was filed upon the same day with the filing of the bill. Counsel for the Worsted Sales Company knew this would be done. It is unnecessary to rehearse the evidence of the persons engaged in this combination to secure in the federal court the earlier receivership; but it is very clear that the whole suit in which the receiver was appointed was brought to secure that end before the action of the state court, and that the prime actor in the whole matter,

which it does not do injustice to say had elements of a conspiracy, was the Daniel Boone Mills Company. Cowan was its lawyer and a member of the executive committee of its directors. He sought and procured the continuance in the state court. He continued to act as that company's attorney in his dealings with Grand and in the conferences between Stern and Johnson. When the form of the bill was changed from a stockholder's bill to a creditor's bill, they all, including Cowan, hunted for a non-resident creditor to consent to file the bill. The whole work was the result of Cowan's active agency. Cowan secured the delay in the state court by what on his part for his company was an agreement that nothing in the interim should be done to affect the litigation in the state court and that the status quo should be maintained. Cowan does not really deny this, though he says he did not think he went so far. What he said in court can not be contested, because it is a stenographic report. The Woolen Mills Corporation was advised that the creditor's bill to be filed could not be sustained because the nominal plaintiff was not a judgment creditor but was a simple nonjudgment creditor (*Lion Bonding & S. Company* v. *Karatz,* 262 U. S. 77, 85), and that that defect could only be remedied and immediate court action secured by an answer of the company admitting the averments of the bill and consenting to a receivership. *Pusey & Jones Company* v. *Hanssen,* 261 U. S. 491, 500. So simultaneously with the filing of the bill, the answer and consent were filed in the federal court. The complainant in the bill was as much the company's agent and tool in bringing the bill as was the Woolen Mills Company's own attorney in filing the answer, and in this aspect the suit was collusive. The complainant, the Worsted Sales Company, was therefore charged with knowledge of the fraud by which delay had been secured in the state court. The other agents whom the defendant company employed to

bring about the result, even if they did not know the means taken to secure the delay, were affected with knowledge of it, because they were acting for the Woolen Mills Company in this transaction in its pursuit of a federal court receivership. We do not impute to Stern or Johnson actual knowledge of Cowan's fraudulent method of securing a postponement in the state court when they filed the bill of complaint. Cowan says he did not tell them. Johnson denies knowledge of it, and there is no evidence that they were informed. But, as explained, their client, the Worsted Sales Company, the complainant, was charged with knowledge of it. The district court did not know these facts when the bill was filed and the receiver was appointed, but they were all brought to its attention when the motion of the state receivers was made and heard and evidence adduced March 13, 1925.

We do not wish what we have said to be taken as a general approval of the appointment of a receiver under the prayer of a bill brought by a simple contract creditor simply because it is consented to at the time by a defendant corporation. The true rule in equity is that under usual circumstances a creditor's bill may not be brought except by a judgment creditor after a return of *"nulla bona"* on execution. When a receiver has been thus irregularly appointed on such a bill without objection, and the administration has proceeded to such a point that it would be detrimental to all concerned to discharge the receiver, the receivership has been permitted to continue because not seasonably objected to (*Pusey & Jones Company* v. *Hanssen*, 261 U. S. 491, 497, 500; *Re Metropolitan Ry. Receivership*, 208 U. S. 90, 109, 111; *United States* v. *Butterworth Corporation*, 269 U. S. 504, 513).

In refusing the motion of the state court receivers for surrender of the property and assets of the Woolen Mills, the district court said:

"It must be borne in mind that the State Court did not act until nine days after the appointment in this Court,

and then upon different pleadings. The statement in the State Court of the attorney for the defendant, even if given the extreme meaning claimed for it (a meaning which in my opinion is not warranted by the evidence) could not operate to invalidate the proceedings of this Court. At most it amounted to an agreement, a violation of which would have been a contempt of the State Court. If it has the force of an injunction, it would not render void the action in the Federal Court."

Again, the same court said, speaking of the state court:

"The Court had taken no action which brought defendant's property within its custody; and it was not until March 13, 1925, that it was claimed in this Court that there was any agreement in the State Court beyond the terms of the order of February 16, 1925. In the meantime, the Federal Court here and in other districts proceeded with the administration of the affairs of the defendant corporation. As Judge Lurton said, it would lead to absurd results and inflict unwarranted injury upon innocent parties, if the alleged oral agreement of the attorney in the State Court, of which there was no record, can be invoked to invalidate the proceedings here."

We differ radically from the trial court as to the purpose and effect of the conduct of Cowan in securing the postponement of the hearing for a receiver in the state court. Ordinarily we should acquiesce in a conclusion of fact by the court that heard the witnesses in such a case, but here the evidence of what was said in the state court is on a stenographic report agreed upon by the parties, and the other circumstances make the necessary inferences therefrom clear.

Nor can we take the view that when the motion of the state court receivers applied for surrender there were then in the federal court case innocent parties upon whom surrender to the state court of the property would work any hardship, for no creditor had come into the case except the complainant, which by its actual relation to the

proceeding was charged with knowledge of the means by which a receivership had been obtained. In respect to the effect of the evidence, the language of the Circuit Court of Appeals shows it took a different view of the facts from that of the district court:

"That the conduct of debtor's first counsel (not the counsel appearing in this court) was far from commendable, is unfortunately, most apparent. It is, happily, not a frequent occurrence that an attorney for a debtor seeks the creditor and urges him to bring suit against his client, or turns over his client's list of creditors to an attorney soliciting business, to say nothing of the violated pledge to the judge and opposing counsel. Moreover, good faith required this counsel to have advised the Federal District Court of the pendency of the State court proceedings.

"The case is one where in their determination to control the receivership, counsel proceeded with such speed and zeal that the code of professional ethics was entirely ignored and forgotten. Counsel should avoid these hurried *ex parte* applications for friendly receivers. In fact, there should be no 'friendly receiverships.' Whenever possible, notice should be given to any and all interested parties. When the debtor corporation appears, however, and consents to such appointment, the court must rely on counsel to inform it as to all the facts. If essential facts are deliberately withheld, counsel may well forfeit his right to practice further, or be otherwise disciplined.

"Notwithstanding the prejudice which this conduct has created, we have approached the question with the understanding that the client's rights rather than attorney's conduct must be the basis for the determination of this litigation."

But we do not agree with either of the courts below that the vindication of the cause of comity and good faith as between the two courts should be limited to punitive

proceedings against the lawyer in the state court whose pledge to that court was broken.

In this country, in which in every state we have courts of concurrent jurisdiction under the federal and the state authority, it is of the highest importance that conflict of jurisdiction should be avoided. It can only be avoided by forbearance and comity, and by enforcing upon the parties and counsel engaged the utmost good faith and the fullest disclosure in one jurisdiction with reference to what are the exact facts relevant to litigation in a corresponding case in the other. This is especially true with respect to receiverships. The desire of those who represent an embarrassed corporation to seek a refuge from active and urgent creditors under the protecting arm of an officer of the court, leads to strenuous efforts to frame a case which may under equity practice justify a receiver. More than this, circumstances which should have no influence lead the parties in interest to prefer one court to another in the selection of the person to be appointed as receiver, with the hope on behalf of those in charge of the embarrassed corporation that the appointment may fall to one whose conduct will be in sympathy with, rather than antagonistic to, the previous management of the corporation, in the hands of which the embarrassment has arisen. As the Court of Appeals says, there should be no "friendly" receiverships, because the receiver is an officer of the court and should be as free from "friendliness" to a party as should the court itself. Nor should there be any competition or rivalry on the part of the two courts themselves in regard to assuming jurisdiction. The temptation of the exercise of power and patronage in the selection of receivers and the management of great businesses under the court should not be a feather's weight in prompting court action. Each court should examine with nicety the question of the right of the parties to have

a receiver and should advise itself in regard to the circumstances making it its duty to exercise this delicate jurisdiction. If the court finds that by misrepresentation or by a false pledge another court has delayed action by which the possession of the *res* would have been taken before the application in hand was made, it should insist that the parties and counsel who have misled the other court must give that court full opportunity to remedy the wrong done. What was done here in delaying the state court and inducing the federal court to act without a full disclosure of what had been done in the state court, was a fraud not only upon the state court but upon the federal court itself, and when the federal court learned the method by which its jurisdiction to appoint a receiver had been invoked, it should have denied to those who were guilty the further use of its jurisdiction until after the state court had been given an opportunity to exercise the jurisdiction which it was entitled to exercise, even to taking possession of the property. As we have already said, there was, when the district court herein came to know the facts, no party before it who was not to be charged with a knowledge of how its jurisdiction had been secured.

It is quite true, as already said, that if there had been no chicanery in the delay of the proceeding in the state court, the difference between the two proceedings would have justified the retention of the jurisdiction by the federal court. But the two proceedings, while not the same, were closely related, and the proceeding in the state court must by the subsequent insolvency have resulted in reframing in the state court the pleadings so as to make it a creditor's bill. Hence they were closely enough related to call upon the federal court to refuse thereafter to continue jurisdiction through its receiver, and to surrender custody of the *res* to the receivers of the state court. Such action we deem to have been that which the comity

and the good faith of a federal court owed to the state court.

But now the condition has changed, and the rights of innocent creditors who have since become parties are involved, the court and the receiver have proceeded to administer the property, have found it necessary to issue receiver's certificates, and have paid them, have sold some of the property and have made some distribution to the creditors. It would be in some ways easier to allow the settlement to go on as it is, but this would not comport with the obligation of a federal court to observe and emphasize the highest good faith and comity towards state courts in matters where the two have concurrent jurisdiction. We therefore shall direct the district court to reverse its action in denying the motion to surrender through its receivers the property of the estate still in its custody to the state court receivers. But the surrender should be only on condition that the state court receivers produce an order from the state court confirming all that has been done in the sale of the property, the disposition of the assets and the distribution thereof as if it had been by its own decree and shall so shape the pleadings and its orders that the case may proceed in the state court as a creditor's bill and a liquidation of all the debts, to enable it to proceed to the complete distribution of all remaining assets in liquidation, as it would have had to do, in view of the insolvency, in a continued administration under the stockholder's bill. The federal court should, before surrender, fix and pay the compensation due to its officers for the work done by them and, in doing so, should take care to fix the compensation within limits which are plainly reasonable. After this and other preliminaries are attended to, all the assets then in the hands of the receiver of the federal court shall be turned over for further and complete distribution in the suit in the Superior Court of Cook County. If such an order of the state court, as is

herein prescribed, is not entered in that court and produced in the federal court in a seasonable time, the pending administration in the federal court under the creditor's bill shall continue.

The decrees of the Circuit Court of Appeals and of the district court are reversed and the case is remanded to the district court for further proceedings in conformity with this opinion.

Reversed.

MARLIN *v.* LEWALLEN ET AL.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 40. Argued October 18, 1927.—Decided February 20, 1928.

1. The surviving husband of a woman of the Creek blood and tribe, whether himself of that blood or not, has no estate of curtesy in land allotted and patented to her in the distribution of the tribal property under the original and supplemental Creek Agreements, Acts of March 1, 1901, and June 30, 1902, and of which she died seized, intestate and leaving issue. Pp. 59, 68.
2. By the Act of June 28, 1898, and prior enactments, tribal laws in the Indian Territory were displaced and a body of laws adopted from the statutes of Arkansas was then put in force, for Indians and whites, except as they might be inapplicable in particular situations or might be superseded as to any of the Five Civilized Tribes by future agreements. P. 62.
3. Statutes of Arkansas adopted by Act of Congress for the Indian Territory, carried with them the settled constructions placed upon them by the Arkansas courts before such adoption. P. 62.
4. Under Chapter 20 of Mansfield's Digest of Arkansas Statutes, as modified by c. 104, both of which were extended to Indian Territory, curtesy initiate was not recognized and curtesy consummate was recognized only where the wife died seized of the land and intestate. P. 62.
5. The Creek Agreements, *supra*, were in the nature of a comprehensive treaty rather than a mere supplement to the fragmentary legislation that preceded them, were to have full effect regardless of any inconsistency with that legislation, and are to be construed,

not according to the technical meaning of their words, but according to the sense in which they would naturally be understood by the Indians. P. 63.

6. These agreements, given their true status as special laws for the Creeks, withdrew the lands of the Creeks from the adopted Arkansas laws of curtesy. P. 65.
7. The Act of April 28, 1904, relating to the jurisdiction of the Special Courts of Indian Territory, and providing for the continuance and extension of the Arkansas laws theretofore put in force there, and conferring full and complete jurisdiction upon the district courts of the Territory in the settlement of all estates of decedents, etc., did not subject the lands of the Creeks to the Arkansas laws of curtesy. P. 67.

113 Okla. 259, reversed.

CERTIORARI, 271 U. S. 654, to a judgment of the Supreme Court of Oklahoma sustaining a claim to an estate by the curtesy in lands allotted and patented to a Creek woman. See also the case next following.

Mr. Claude A. Niles, with whom *Mr. S. P. Freeling* was on the brief, for petitioner.

Mr. Harry B. Parris, with whom *Messrs. Martin E. Turner* and *Kirk B. Turner* were on the brief, for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This case presents a controverted claim to an estate by the curtesy in lands allotted and patented to a Creek woman in the distribution of the tribal property. The district court of the county where the lands lay rejected the claim; but on appeal to the Supreme Court of the State the claim was upheld, three judges dissenting. 113 Okla. 259.

The lands were allotted and patented under two agreements between the United States and the Creek tribe which will be described later on. The allottee was a mar-

ried woman of Creek blood and was enrolled as a member of the tribe. Her husband was a white man without tribal enrollment or membership. She died intestate November 29, 1904, while seized of the lands, and was survived by her husband, by issue of her marriage with him and by issue of a former marriage, all of the issue being Creeks and capable of inheriting the lands.

Two questions are pressed on our attention: Did the laws then applicable to the Creek lands provide for an estate by the curtesy? If so, did they extend it to a husband who was not a Creek where there were Creek descendants capable of taking the full title?

For many years the Creeks maintained a government of their own, with executive, legislative and judicial branches. They were located in the Indian Territory and occupied a large district which belonged to the tribe as a community, not to the members severally or as tenants in common. The situation was the same with the Cherokees, Choctaws, Chickasaws and Seminoles, who with the Creeks were known as the five civilized tribes. All were under the guardianship of the United States and within territory over which it had plenary jurisdiction, thus enabling it to exercise full control over them and their districts whenever it perceived a need therefor.[1] In the beginning and for a long period, during which the districts were widely separated from white communities, the United States refrained in the main from exerting its power of control and left much to the tribal governments. Accordingly the tribes framed and put in force various laws which they regarded as adapted to their situations, including laws purporting to regulate descent and distribution [2] and to exclude persons who were not members from sharing in

[1] *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 483, et seq.; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 305, et seq.

[2] Bledsoe's Indian Land Laws, 2d ed. pp. 640–643.

tribal lands or funds.[3] In time the tribes came, through advancing settlements, to be surrounded by a large and increasing white population, many of the whites entering their districts and living there—some as tenant farmers, stock growers and merchants, and others as mere adventurers. The United States then perceived a need for making a larger use of its powers.[4] What it did in that regard has a bearing on the questions before stated.

By an act of March 1, 1889, c. 333, 25 Stat. 783, a special court was established for the Indian Territory and given jurisdiction of many offenses against the United States and of certain civil cases where not wholly between persons of Indian blood. By an act of May 2, 1890, c. 182, §§ 29–31, 26 Stat. 93, that jurisdiction was enlarged and several general statutes of the State of Arkansas, published in Mansfield's Digest, were put in force in the Territory so far as not locally inapplicable or in conflict with laws of Congress; but these provisions were restricted by others to the effect that the courts of each tribe should retain exclusive jurisdiction of all cases wholly between members of the tribe, and that the adopted Arkansas statutes should not apply to such cases. By an act of March 3, 1893, c. 209, § 16, 27 Stat. 645, a commission to the five civilized tribes was created and specially authorized to conduct negotiations with each of the tribes looking to the allotment of a part of its lands among its members, to some appropriate disposal of the remaining lands and to further adjustments preparatory to the dissolution of the tribe. By an act of June 7, 1897, c. 3, 30 Stat. 83–84, the special court was given exclusive jurisdiction of all future cases, civil and criminal, and the laws of the United

[3] Perryman's Creek Laws 1890, c. 7; McKellop's Creek Laws 1893, c. 22; *Cherokee Intermarriage Cases*, 203 U. S. 76.

[4] *Heckman* v. *United States*, 224 U. S. 413, 431–435; *Sizemore* v. *Brady*, 235 U. S. 441, 446.

States and the State of Arkansas in force in the Territory were made applicable to "all persons therein, irrespective of race," but with the qualification that any agreement negotiated by the commission with any of the five civilized tribes, when ratified, should supersede as to such tribe any conflicting provision in the act. By an act of June 28, 1898, c. 517, §§ 26 and 28, 30 Stat. 495, the enforcement of tribal laws in the special court was forbidden and the tribal courts were abolished.

Thus the congressional enactments gradually came to the point where they displaced the tribal laws and put in force in the Territory a body of laws adopted from the statutes of Arkansas and intended to reach Indians as well as white persons, except as they might be inapplicable in particular situations or might be superseded as to any of the five civilized tribes by future agreements.

Of the adopted Arkansas laws chapters 20, 49 and 104 are all that need be noticed. Chapter 20 made the common law, as far as applicable, the rule of decision where not changed by statute. Chapter 49 provided for the descent and distribution of property of intestates. Chapter 104 enabled married women to control, convey and devise their real property independently of their husbands. When first enacted chapter 20 was regarded as recognizing the common-law estate by the curtesy with both its initiate and consummate gradations. But after the enactment of chapter 104, which was a later statute, chapter 20 was construed by reason thereof as no longer recognizing curtesy initiate, which at common law vested during coverture, and as recognizing curtesy consummate only where the wife died seized of the land and intestate. *Neelly* v. *Lancaster*, 47 Ark. 175. Both chapters were adopted for the Indian Territory after that construction had become well settled; so, according to a familiar rule, the adoption included that construction. *Joines* v. *Pat-*

terson, 274 U. S. 544; *Adkins* v. *Arnold,* 235 U. S. 417, 421; *Gidney* v. *Chappel,* 241 U. S. 99, 102.

In 1900 the commission succeeded in negotiating with representatives of the Creek tribe an agreement such as was intended by the Acts of March 3, 1893, and June 7, 1897. That agreement—known as the original Creek agreement—was ratified by Congress March 1, 1901, c. 676, 31 Stat. 861, and became effective May 25, 1901, on its ratification by the tribal council. 32 Stat. 1971. A modifying agreement—known as the supplemental Creek agreement—was then negotiated. It was ratified by Congress June 30, 1902, c. 1323, 32 Stat. 500, and became effective August 8, 1902, through its ratification by the tribal council and the proclamation of that fact by the President. 32 Stat. 2021.

The agreements, taken together, embodied an elaborate plan for terminating the tribal relation and converting the tribal ownership into individual ownership, and also many incidental provisions controlling descent and distribution, fixing exemptions from taxation, preventing improvident alienation and protecting the individual allottees and their heirs in the enjoyment of the property. It is apparent from the terms and scope of the agreements that they were in the nature of a comprehensive treaty rather than a mere supplement to the fragmentary legislation which preceded them; and it is apparent from their repealing provisions—§ 41 of one and § 20 of the other—that they were to have full effect regardless of any inconsistency with that legislation, as was contemplated in the Act of June 7, 1897, which extended the adopted Arkansas laws to Indians.

The Arkansas law of curtesy was among the laws so extended. But that did not make it presently applicable to the Creek lands, they being then in tribal ownership. Such applicability would come only if and when indi-

vidual ownership was substituted for tribal ownership. The agreements provided for such a change, and had they stopped there that law would have become applicable. But instead of stopping there they proceeded to deal, among other things, with the taxation, alienation and devolution of the lands. Whether these further provisions in effect excluded curtesy under that law is one of the questions in this case. Of course it is a question of construction.

In taking up this question it must be remembered that the agreements were between the United States and a dependent Indian tribe then under its guardianship, and therefore that they must be construed, "not according to the technical meaning of their words to learned lawyers, but according to the sense in which they would naturally be understood by the Indians." [5]

Neither agreement contained any mention of curtesy. But they did provide to whom the land should go on the owner's death intestate. The original agreement, in §§ 7 and 28, declared that it should "descend to his heirs" according to the laws of descent and distribution of the tribe. *Washington* v. *Miller*, 235 U. S. 422, 425. Curtesy was not recognized in those laws. They were crude and soon were found to be unsuited to the new situation. The supplemental agreement, in § 6, put them aside and substituted chapter 49 of Mansfield's Digest, with two provisos declaring that members of the tribe and their Creek descendants, where there were such among those coming within the terms of that chapter, should "take the descent" to the exclusion of others.[6] *Grayson* v. *Harris*,

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[5] *Jones* v. *Meehan*, 175 U. S. 1, 11; *Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355, 366–367; *Choctaw Nation* v. *United States*, 119 U. S. 1, 28; *Choate* v. *Trapp*, 224 U. S. 665, 675.

[6] The full section read as follows: "The provisions of the act of Congress approved March 1, 1901 (31 Stat. L., 861), in so far as they provide for descent and distribution according to the laws of

267 U. S. 352. Chapter 20 of Mansfield's Digest, on which the adopted Arkansas law of curtesy was based, was not mentioned. Chapter 49, which was particularly called into play, was the adopted Arkansas law of descent and distribution. It said nothing about curtesy.

Plainly there was nothing in the agreements which could have been understood by the Indians—or even by others—as providing for curtesy; and this is true of the tribal laws temporarily recognized by the original agreement and of chapter 49 of Mansfield's Digest which was substituted for them by the supplemental agreement.

Did the agreements, rightly construed, exclude curtesy under chapter 20 of Mansfield's Digest on which the adopted Arkansas law of curtesy rested? That law was not a special one for the Creeks; nor was it more than prospectively applicable to their lands. The agreements, on the other hand, were negotiated and put in force as special laws for the Creeks. They dealt particularly with the allotment in severalty, exemption from taxation, alienation and devolution of the Creek lands; and their provisions on these subjects were such that the Indians naturally would regard them as complete in themselves and not affected by other laws not brought into them by distinct reference. We have seen that the Arkansas law of curtesy was not thus brought in. Both agreements provided that on the death of an individual owner the lands should "descend" to the "heirs" according to particular laws designated as controlling standards—the

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the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendents shall inherit lands of the Creek Nation: *And provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

tribal laws of descent being designated in the original agreement and chapter 49 of Mansfield's Digest being substituted by the supplemental agreement. In the absence of any restricting provision—and there was none—the Indians naturally would regard that provision as comprehending the full title and intended to effect its transmission to the persons who would be the heirs under the laws specially designated, and in the relative proportions there indicated. They further would understand that those persons were to take the title to the exclusion of others, and not that they were to take it subject to a life estate concurrently passing to another under a law which was not mentioned. We say "concurrently passing" because the restricted form of curtesy recognized by the Arkansas law did not attach during coverture, but only on the wife's death and then only where she died seized of the land and intestate. *Neelly* v. *Lancaster,* 47 Ark. 175. It has been described by the Supreme Court of Oklahoma as "in the nature of an estate by descent," and as passing to the surviving husband as an heir. *Zimmerman* v. *Holmes,* 59 Okla. 253, 256–257.

Some reliance is placed on the use of the words "descend" and "heirs" in the provision we are considering; but there can be little doubt that in the connection in which they were used the Indians would accept them in an untechnical and comprehensive sense. The decision last cited illustrates that their use in a broad sense is not unusual.

Our construction of that provision has support in another closely related to it. The allotment of the tribal lands was to be made among the enrolled members, including children born to them up to and including May 25, 1901; and each of these was to receive with other lands a tract designated as a homestead. Section 16 of

the supplemental agreement, closely copying a part of § 7 of the original agreement, provided:

"The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed."

Of course the homestead of a wife could not remain after her death for the use and support of children, as this provision directed it should in certain instances, and also pass on her death to her husband for his life by way of curtesy. So it is at least inferable from that direction that both the United States and the Indians understood there was to be no curtesy.

These considerations make it apparent, we think, that the agreements—given their true status as special laws for the Creeks and rightly construed—excluded curtesy under the adopted Arkansas law—or, putting it in another way, withdrew the lands of the Creeks from the operation of that law.

After the agreements were put in force, Congress included in an act of April 28, 1904, c. 1824, 33 Stat. 573, relating to the jurisdiction of the special courts for the Indian Territory, a provision reading as follows:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedman, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlements of all estates of decedents, the guardianships of

minors and incompetents, whether Indians, freedmen, or otherwise."

It is contended that this provision subjected the lands of the Creeks to the Arkansas law of curtesy and modified the agreements accordingly. We are of a different opinion. The provision was couched in general terms, did not refer to the agreements, did not mention curtesy or the Creek lands, and contained no repealing clause. No doubt it was intended to extend the operation of the Arkansas laws in various ways; but it fell far short of manifesting a purpose to make them effective as against special laws enacted by Congress for particular Indians, such as the agreements with the Creeks. We have so construed it in other cases not distinguishable in principle. *Washington* v. *Miller,* 235 U. S. 422, 427; *Taylor* v. *Parker,* 235 U. S. 42, 44. And the Supreme Court of the State had taken a like view of it even before our decisions were given. *In re Davis' Estate,* 32 Okla. 209; *Taylor* v. *Parker,* 33 Okla. 199.

We accordingly hold that at the time of the allottee's death—November 29, 1904—the laws applicable to the lands of the Creeks did not provide for an estate by the curtesy.

The Supreme Court of the State in holding otherwise in this and other cases cited in its opinion passed in silence over the status of the agreements as special laws and the exclusive nature of their provisions, and rested its decision on the other legislation adopting and extending the Arkansas laws. In this it departed from applicable decisions of this Court and in effect put aside some of its own earlier rulings.

As we hold there was no law providing for an estate by the curtesy, the fact that the surviving husband was not a Creek becomes immaterial.

Judgment reversed.

LONGEST *v.* LANGFORD.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 52. Submitted October 19, 1927.—Decided February 20, 1928.

Under § 22 of the Choctaw and Chickasaw Agreement of July 1, 1902, lands allotted in the name of a married Choctaw woman who died after the ratification of the Agreement and before receiving her allotment, pass to those who are her heirs according to c. 49 of Mansfield's Digest, free from any claim of curtesy. See *Marlin* v. *Lewallen, ante,* p. 58. P. 71.

114 Okla. 50, reversed.

CERTIORARI, 274 U. S. 499, to a judgment of the Supreme Court of Oklahoma sustaining a claim to an estate of curtesy in lands allotted and patented in the name and right of a Choctaw woman after her decease.

Messrs. H. A. Ledbetter and *H. E. Ledbetter* were on the brief for petitioner.

Messrs. W. F. Semple, S. Russell Bowen, Guy Green, and *Robert R. Pruet* were on the brief for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

A claim to an estate by the curtesy in lands allotted and patented in the name and right of a Choctaw woman then deceased is here in controversy. It was sustained by the state court. 114 Okla. 50. The allotment was made and the patent issued under two agreements between the United States and the Choctaw and Chickasaw tribes. Act June 28, 1898, c. 517, § 29, 30 Stat. 505; Act July 1, 1902, c. 1362, 32 Stat. 641.

The agreements set forth a comprehensive scheme for allotting the lands of the two tribes in severalty among

their members, distributing the tribal funds and dissolving the tribes. There were also many other related provisions. Nothing was said about curtesy. The agreements were strictly special laws for the Choctaws and Chickasaws.

By prior enactments couched in general terms Congress had put in force in the Indian Territory, and made applicable to the people therein irrespective of race, several statutes of Arkansas.[1] One of these Arkansas statutes—chapter 20 of Mansfield's Digest—had been construed as recognizing a form of curtesy consummate attaching on the death of the wife intestate where she was then seized of the land. Another—chapter 49 of the same publication—related to descent and distribution. The Choctaw and Chickasaw lands were in the Indian Territory, and so were the lands of several other Indian tribes. The claim in this case is rested on the adopted Arkansas law of curtesy.

The second of the two agreements—it largely superseded the first—required that the lands of the two tribes be allotted among the enrolled members who were living at the date of its ratification. Anticipating that some of these might die before the allotments were made, the agreement provided in § 22:

"If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas."

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[1] These congressional enactments and the indicated Arkansas laws are described in *Marlin* v. *Lewallen*, *ante*, p. 58.

The lands in dispute were allotted under that section; and the real controversy here is over its construction. It is part of a special law put in force with the solicited assent of the Choctaws and Chickasaws and applicable only to them. We think it would be understood by the Indians as meaning that lands allotted under it in the name of a deceased member should pass to those who would be his or her heirs according to chapter 49 of Mansfield's Digest. With that chapter specially designated and chapter 20—the sole basis of the Arkansas law of curtesy—not mentioned the Indians certainly would not understand that curtesy was intended. It follows that § 22 must be construed as intended to pass the full title free from any claim to curtesy. *Marlin* v. *Lewallen*, *ante*, p. 58.

Judgment reversed.

LIBERTY WAREHOUSE COMPANY *v.* BURLEY TOBACCO GROWERS' CO-OPERATIVE MARKETING ASSOCIATION.

ERROR TO THE COURT OF APPEALS OF KENTUCKY.

No. 18. Argued February 23, 1927.—Decided February 20, 1928.

1. A party challenging a judgment of a state court must show that its enforcement would deprive him, not another, of some right arising under the Constitution or laws of the United States properly asserted below. P. 88.
2. The power lodged in state courts to conform their proceedings to reasonable requirements of local law was not abused in this case by an order striking a part of the answer, based apparently upon the Kentucky Declaratory Judgment Law, asking the court to determine the validity of the statute here in question and to declare defendant's rights and duties, and advancing a counterclaim. P. 88.
3. *Semble* that the Kentucky Declaratory Judgment Law does not authorize a defendant to ask judgment by counterclaim. P. 88.

4. This Court has no jurisdiction to review a mere declaratory judgment. P. 89.
5. An answer alleging that the plaintiff is a trust or combination organized for the purpose of creating and carrying out restrictions of trade unlawfully and contrary to the common law, without mentioning the Constitution or any statute of the United States, does not raise a federal question. *Id.*
6. A corporation does not possess the privileges and immunities of a citizen of the United States within the meaning of the Constitution. *Id.*
7. The Co-operative Marketing Act of Kentucky, aiming, in the public interest, to assist agricultural producers in the orderly marketing of their products and to protect them and consumers from manipulation of prices by middlemen, authorizes the incorporation of non-profit associations, with membership confined to such producers and with power to contract with their respective members only for the sale to the corporation of their respective crops of the products dealt in, during a period of not more than ten years, and for marketing thereof by the corporation and disposition of the proceeds, less expenses, among the members according to the quantity and quality of their deliveries. It declares that such an association shall not be deemed a conspiracy, illegal combination or monopoly; that such contracts shall not be illegal; that any person knowingly inducing a breach of such a contract by a member shall be guilty of a misdemeanor, subject to fine and liable to the association in a civil suit in the penal sum of $500 for each offense; and that any warehouseman shall be liable to the association in the same penalty, who, having knowledge or notice of such a contract, persuades or permits the member who made it to break it, by accepting or receiving his products for sale or auction contrary to the terms of such contract. *Held:*

   (1) No right of a warehouse company guaranteed by the Fourteenth Amendment is impaired by merely authorizing corporations, with membership limited to agriculturalists, and permitting contracts for purchase and resale of farm products. P. 89.

   (2) This is also true of the declaration that such associations shall not be deemed monopolies, combinations, etc., in restraint of trade, and that contracts with members shall be deemed legal. The State may declare its own policy in such matters. *Id.*

   (3) There is nothing to show that in Kentucky, since the passage of the Act, other producers may not form voluntary associations and make and enforce contracts like those which the Act expressly authorizes. P. 90.

(4) As the statute does not prescribe more rigorous penalties for warehousemen than for others who willingly solicit, persuade or induce a member to break his marketing contract with his association, a claim that the provision in that regard deprives warehousemen of the equal protection of the laws, is without substantial basis. *Connolly* v. *Union Pipe Co.*, 184 U. S. 540, distinguished. P. 91.

(5) *Quaere,* whether the liberty protected by the Constitution includes the right to induce a breach of contract between others for the aggrandizement of the intermeddler. P. 91.

(6) The statute is of a kind that promotes the common interest, and provision for protecting the marketing contracts between an association and its members is essential to its plan; the legislature was within its powers in providing against probable interference and to that extent limiting the liberty of contract previously enjoyed by warehousemen. Pp. 92, 96.

8. The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of the statute have reasonable relation to a proper purpose. P. 97.

9. A provision for a penalty to be received by the aggrieved party as punishment for the violation of a statute, does not invalidate it. *Id.*

10. The pleadings in this case allege no burden upon interstate commerce amounting to regulation, nor do they properly and definitely advance any claim under a federal statute. P. 89.

208 Ky. 643, affirmed.

ERROR to a judgment of the Court of Appeals of the State of Kentucky, which affirmed a judgment for a penalty and attorney's fees, recovered by the above-named defendant in error from the plaintiff in error in an action by the former under the Kentucky Co-operative Marketing Act.

Mr. Allan D. Cole, with whom *Mr. J. M. Collins* was on the brief, for plaintiff in error.

The Court of Appeals erred in taking and substituting judicial knowledge of an alleged history of the country and current events as a controlling reason to the exclusion of the undisputed facts disclosed by the record and

thereby denying to plaintiff in error due process of law. R. C. L. 1059; *Walton* v. *Stafford,* 43 N. Y. S. 1049; *North Hempstead* v. *Gregory,* 65 N. Y. S. 867; *Peyroux* v. *Howard,* 7 Pet. 342; *Brown* v. *Piper,* 91 U. S. 337; *Arkansas* v. *K. & T. Coal Co.,* 183 U. S. 190; Thayer on Evidence, c. 7, p. 181; *Powell* v. *Brunswick Co.,* 150 U. S. 433; *First National Bank* v. *Ayers,* 160 U. S. 667.

Since section 27 of the Bingham Act undertakes to confer upon defendant in error and others of its class the exclusive right to prosecute a penal action where no penal offense has been committed, it denies to plaintiff in error the equal protection of the laws.

If the right of recovery be not a penal action, it still denies to plaintiff in error the equal protection of the laws, in that it creates an action unknown to the common law, as declared in the case of *Chambers & Marshall* v. *Baldwin,* 91 Ky. 121, and hence is an exclusive privilege.

It denies equal protection of the laws in that it excludes all individuals and every corporation not organized under the Bingham Act from the enjoyment of a right of action for a tort against a third party for inducing or persuading one of the parties to breach a contract. *Atchison, etc., R. R. Co.* v. *Matthews,* 174 U. S. 104; *Opinion of Justices,* 211 Mass. 618.

It denies due process of law in that it takes from the jury the right to determine, and from the plaintiff in error the right to have them determine, the amount of damages to the property of defendant in error based upon the facts of the case. 6 R. C. L., p. 453; 12 C. J., p. 1234; *L. & N.* v. *Finn,* 235 U. S. 608.

The allowance of attorneys fees denies equal protection of the laws, in that the classification is based upon persons and not upon the character of the litigation. *Atchison etc., Ry.* v. *Vosburg,* 238 U. S. 59.

Prohibiting third parties to buy or handle products under contract with defendant in error infringes the liberty of contract guaranteed to plaintiff in error by the Fourteenth Amendment. *Minnesota Wheat Growers Co-operative Market Ass'n* v. *Radke,* 163 Minn. 403.

The section attempts to prevent all dealings between members of a co-operative marketing association and outsiders in respect to products contracted for by the association, no matter how free from legal malice or devoid of inducement the conduct of the outsiders may have been, provided they knew that the product was under contract. *Sweeney* v. *Smith,* 167 Fed. 385; affirmed 171 Fed. 645; *Northern Wisconsin Co-operative Tobacco Pool* v. *Bekedal,* 182 Wis. 571.

It is beyond the power of the legislature to make it a tort to purchase, in the ordinary course of a legitimate business, from the true owner, a wholesome staple commodity upon which there is no lien and which is not under any ban or regulation because of inherent qualities or use. *Williams* v. *Evans,* 139 Minn. 32; *Miller* v. *Wilson,* 236 U. S. 373; *Wolff Packing Co.* v. *Court of Industrial Relations,* 267 U. S. 552.

The purpose of classification under § 27 is private, not public welfare. See *Lawton* v. *Steele,* 152 U. S. 137; *Adams* v. *Tanner,* 244 U. S. 595; *Noble State Bank* v. *Haskell,* 219 U. S. 104; *Eubank* v. *Richmond,* 226 U. S. 137; *Munn* v. *Illinois,* 94 U. S. 113; *McLean* v. *Arkansas,* 211 U. S. 539; *Brass* v. *North Dakota,* 152 U. S. 391; *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389.

Section 27 undertakes to regulate interstate commerce. *Binderup* v. *Pathe Exchange,* 263 U. S. 309; *Stafford* v. *Wallace,* 258 U. S. 516; *Swift & Co.* v. *United States,* 196 U. S. 375; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189; *Austin* v. *Tennessee,* 179 U. S. 343; *Cook* v. *Marshall County,* 196 U. S. 261; *Leizy* v. *Harden,* 135 U. S. 100.

Since the Act in question, under regulations therein prescribed and penalties denounced, forbids warehousemen in all the States of the Union conducting warehouses in Kentucky from shipping their products of Burley Co-operative Growers into Kentucky for sale at public auction over the floors of loose leaf tobacco warehouses, regardless of the nature of the contracts under which the shipments are made, or the manner and condition in which the products are shipped, it follows that it directly interferes with the transportation, by land or water from one State to another, which transportation is itself interstate commerce.

If a recovery cannot be had upon a contract which was made to further the objects of an illegal combination (*Continental Wall Paper Co.* v. *Lewis Voight,* 212 U. S. 227), upon what principle can a recovery be had where damages are sought against a third party for inducing the breach of a contract, which, if sued upon, would itself have been unenforceable?

Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restraining the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. *Addyston Pipe Co.* v. *U. S.,* 175 U. S. 211; *C. N. O. Fuel Co.* v. *U. S.,* 155 Fed. 610; *O'Halloran* v. *American Sea Breen Slate Co.,* 207 Fed. 187; *Ford Motor Co.* v. *Union Motor Sales Co.,* 244 Fed. 156; *Miles Medical Co.* v. *Park etc. Co.,* 220 U. S. 373; *U. S.* v. *Kellogg Toasted Corn Flakes Co.,* 222 Fed. 725; *Knawer* v. *U. S.,* 237 Fed. 8; *Monarch Tobacco Works* v. *American Tobacco Co.,* 165 Fed. 774; *Swift* v. *U. S.* 196 U. S. 375.

Notwithstanding the repeal of the Anti-Trust Act of 1890 by the General Assembly of Kentucky during the

same session which it enacted the Bingham Act, there stands the common law. *Gay* v. *Brent,* 166 Ky. 883; *Commonwealth* v. *Hatfield Coal Co.,* 186 Ky. 411; *Love* v. *Kozy Theatre Co.,* 193 Ky. 336.

If persons under the same circumstances and conditions are treated differently, the Act in question does not classify, but arbitrarily discriminates. See *Hing* v. *Crowley,* 113 U. S. 702; *Railway Co.* v. *Beckwith,* 129 U. S. 26; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *McFarland* v. *American Refining Co.,* 241 U. S. 79.

Statutes purporting to prohibit the formation of trusts for the purpose of fixing the price or regulating the production of articles of commerce, but exempting from their provisions all persons engaged in agriculture and raising live stock, are unconstitutional as class legislation denying the equal protection of the laws to those not included in the exempted class. 6 R. C. L., § 396; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Brown* v. *Jacobs Pharmacy Co.,* 115 Ga. 429; *Davis* v. *Massachusetts,* 167 U. S. 43; *New York etc. R. R.* v. *Bristol,* 151 U. S. 567; *Cantina* v. *Tillman,* 54 Fed. 947; *Parks* v. *State,* 159 Ind. 211; *State* v. *Bohemier,* 96 Me. 257; *State* v. *Latham,* 115 Me. 176; *American Coal Co.* v. *Allegany County Comm'rs,* 128 Md. 594; *Commonwealth* v. *Abrahams,* 156 Mass. 57; *People* v. *Coolidge,* 124 Mich. 664; *McKinster* v. *Sager,* 163 Ind. 671. See *Truax* v. *Corrigan,* 257 U. S. 335; *Gulf C. & S. F. R. R.* v. *Ellis,* 165 U. S. 150; *In re Opinion of Justices,* 211 Mass. 618; *U. S.* v. *American Linsed Oil Co.,* 262 U. S. 388; *American Column & Lumber Co.* v. *United States,* 257 U. S. 66.

Certain it is that the defendants are associated in a new form of combination and are resorting to methods which are not normal. If, looking at the entire contract by which they are bound together, in the light of what has been done under it, the Court can see that its necessary tendency is to suppress competition in trade between the

States, the combination must be declared unlawful. *American Column & Lumber Co.* v. *United States,* 257 U. S. 66.

Plaintiff in error, having been injured by the method of defendant in error in conducting its business, was compelled to ask for relief asserted in the third paragraph of its answer in the form of a counterclaim; because the admitted facts therein recited conclusively show defendant in error to be a monopoly, trust and combine operating in violation of the Federal Anti-Trust Laws. *Clabough* v. *Southern Wholesale Growers Ass'n,* 181 U. S. 706.

If § 27 is invalid, defendant in error has no right of action, and the counterclaim of plaintiff in error stands alone as a direct action. If for any reason it should be proper to eliminate from the third paragraph so much of its allegations as invokes damages under the Sherman Anti-Trust Act, there would remain sufficient allegations to enable plaintiff in error to amend, and under the facts stated, invoke damages pursuant to the provisions of the common law. *L. & N. Ry.* v. *Pointer,* 113 Ky. 952.

Any person who has been injured in his trade or business by the activities of an unlawful combination for that purpose is now generally held to be entitled to recover damages in an action at law for the loss suffered, both at common law and under the Anti-Trust statutes. *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 513.

The counterclaim of plaintiff in error is not a suit in equity to prevent and restrain violations of the Sherman Act; nor does it indirectly attack the existence of defendant in error corporation, but calls in question the powers which the corporation has undertaken to exercise by reason of which plaintiff in error has been injured. Distinguishing, *Wilder* v. *Corn Products Co.,* 236 U. S. 165.

Mr. Aaron Sapiro, with whom *Messrs. Robert S. Marx* and *R. W. Bingham* were on the brief, for defendant in error.

The Co-operative Marketing Act provides a reasonable basis of classification. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; *Clark* v. *Kansas City*, 176 U. S. 114; *Cargill* v. *Minnesota*, 180 U. S. 452; *St. John* v. *New York*, 201 U. S. 633; *Watson* v. *Maryland*, 218 U. S. 173; *Hunter* v. *Mutual Reserve Ins. Co.*, 218 U. S. 573; *German Alliance Ins. Co.* v. *Hale*, 233 U. S. 307; *Armour & Co.* v. *North Dakota*, 240 U. S. 510; *Omechevarria* v. *Idaho*, 246 U. S. 343; *Armour* v. *Virginia*, 246 U. S. 1; *Heisler* v. *Colliery Co.*, 260 U. S. 245; *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U. S. 129; *Jones* v. *Union Guano Co.*, 264 U. S. 171; *Packard* v. *Banton*, 264 U. S. 140; *Payne* v. *Kansas*, 248 U. S. 112; *Merchants Exchange of St. Louis* v. *Missouri ex rel. Barker*, 248 U. S. 365; *Dillingham* v. *McLaughlin*, 264 U. S. 370; *Missouri, K. T. Rwy.* v. *May*, 194 U. S. 267; *International Harvester Co.* v. *Missouri*, 234 U. S. 199; *Jewel Tobacco Warehouse Co.* v. *Kemper*, 206 Ky. 667.

This Court has definitely approved classifications of farmers and agricultural producers as reasonable and natural. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389; *New York Central R. R.* v. *White*, 243 U. S. 188; *Ward* v. *Krinsky*, 259 U. S. 503; *Miller* v. *Wilson*, 236 U. S. 373; *Smith* v. *Kansas City Trust Co.*, 255 U. S. 180; *National Union Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71.

The courts have specifically upheld the classification contained in the Standard Co-operative Marketing Acts. *Harrell* v. *Cane Growers Co-op. Ass'n*, 160 Ga. 30; *Clear Lake Co-op. Live Stock Shippers Ass'n* v. *Weir*, 200 Ia. 1293; *Rifle Potato Growers* v. *Smith*, 78 Colo. 171; *Owen County Burley Tobacco Society* v. *Brumback*, 128 Ky. 137; *Potter* v. *Dark Tobacco Growers Co-op. Ass'n*, 201 Ky. 441.

The provision that co-operative associations shall not be considered in restraint of trade or contrary to the laws against pooling or combinations, is a proper declaration of public policy.

The Congress of the United States has declared this policy. Clayton Act; Capper-Volstead Act, February 18, 1922; Co-operative Marketing Act, July 2, 1926.

Anti-Trust laws are an expression of public policy adopted by the legislature and by Congress, and may be changed. That public policy has undergone a change since the enactment of the original Sherman Anti-Trust Law and the anti-trust laws of the several States, has been recognized by the courts in numerous cases and has been recognized at common law without regard to statute. *Potter* v. *Dark Tobacco Growers Co-op. Ass'n,* 201 Ky. 441; *Rifle Potato Growers* v. *Smith,* 78 Colo. 171; *Harrell* v. *Cane Growers Co-op. Ass'n,* 126 S. E. 531; *List* v. *Burley Tobacco Growers Co-op. Ass'n,* 114 O. S. 361; *Clear Lake Co-op. Live Stock Shippers Ass'n* v. *Weir,* 200 Ia. 1293; *Northern Wisconsin Co-op. Tobacco Pool* v. *Bekkedal,* 182 Wis. 571; *Burley Tobacco Society* v. *Gillaspy,* 51 Ind. App. 583; *U. S.* v. *Freight Ass'n,* 166 U. S. 290; *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365. *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, distinguished. See *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *New York Central R. R.* v. *White,* 243 U. S. 188; *Miller* v. *Wilson,* 236 U. S. 373; *Billings* v. *Illinois,* 188 U. S. 97; *Cox* v. *Texas* 202 U. S. 446; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443.

The *Connolly* case has uniformly been held inapplicable to co-operative marketing cases. *Dark Tobacco Growers Co-op. Ass'n* v. *Dunn,* 150 Tenn. 612; *Kansas Wheat Growers Ass'n* v. *Charlet,* 118 Kans. 965; *List* v. *Burley Tobacco Growers Co-op. Ass'n,* 114 O. S. 361; *Minnesota Wheat Growers Co-op. Marketing Ass'n* v.

Huggins, 162 Minn. 471; *Northern Wisconsin Co-op. Tobacco Pool* v. *Bekkedal,* 182 Wis. 571.

Sections 26 and 27 are reasonable and necessary provisions to make the co-operative marketing system practical and effective and to safeguard the marketing contract between the association and its members from breach deliberately induced by third persons outside the association. *Tobacco Growers Warehouse Ass'n.* v. *Danville Warehouse Co.,* 144 Va. 456; *Northern Wisconsin Co-op. Tobacco Pool* v. *Bekkedal,* 182 Wis. 571; *Hollingsworth* v. *Texas Hay Ass'n,* 246 S. W. 1068; *Texas Farm Bureau Cotton Ass'n.* v. *Stovall,* 113 Tex. 273.

The marketing contract is the cornerstone of the co-operative marketing structure. The legislature has a right to protect such contracts against breach which threatens the marketing system. *Commonwealth* v. *Hodges,* 137 Ky. 233; *Hollingsworth* v. *Texas Hay Ass'n.,* 246 S. W. 1068; *Tobacco Growers Co-op. Ass'n.* v. *Danville Warehouse Co.,* 144 Va. 456.

The penal provision is necesary to protect the contract. Therefore, the courts have, without exception, sustained the remedies provided by the Co-operative Marketing Act to enforce the performance of the contract. *Burley Tobacco Society* v. *Gillaspy,* 51 Ind. App. 583; *Arkansas Cotton Growers Co-op. Ass'n* v. *Brown,* 275 S. W. 46; *Harrell* v. *Cane Growers Co-op. Ass'n,* 160 Ga. 30; *Kansas Wheat Growers Ass'n* v. *Schulte,* 113 Kan. 672; *Manchester Dairy System* v. *Hayward,* 82 N. H. 193; *Oregon Growers Co-op. Ass'n* v. *Lentz,* 173 Ore. 571; *Owen County Burley Tobacco Society* v. *Brumback,* 128 Ky. 137; *Dark Tobacco Growers Co-op. Ass'n* v. *Dunn,* 150 Tenn. 612; *Dark Tobacco Growers Co-op. Ass'n* v. *Mason,* 150 Tenn. 228.

It is an actionable tort for an outsider to deliberately and maliciously interfere with the contract relations of other parties. *Lumley* v. *Gye,* 2 El. & Bl. 216; *Bowen* v.

Hall, 6 Q. B. 333; *Temperton* v. *Russell,* 1 Q. B. 719; *Angle* v. *Chicago, St. P. & M. & O. Rwy.,* 151 U. S. 1; *Bitterman* v. *L. & N. Rwy.,* 207 U. S. 205; *Kinner* v. *Lake Shore & M. S. R. R.,* 69 O. S. 339; *Schulbach* v. *McDonald,* 179 Mo. 163; *Samuelson* v. *State,* 116 Tenn. 470; *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229; 16 Rose's Notes, 727; *Westinghouse Electric & Mfg. Co.* v. *Diamond State Fiber Co.,* 268 Fed. 121; 15 R. C. L. 60; 38 Cyc. 508; *Northern Wisconsin Co-op. Tobacco Pool* v. *Bekkedal,* 182 Wis. 571; *R. and W. Hat Shop* v. *Scully,* 98 Conn. 1; *Thacker Coal & Coke Co.* v. *Burke,* 59 W. Va. 253; *Beekman* v. *Marsters,* 195 Mass. 205; *Swain* v. *Johnson,* 151 N. C. 93; 17 Col. Law Rev. 113; 36 Har. Law Rev. 663.

Sections 26 and 27 are a proper exercise of police power to prevent fraudulent and unlawful evasion or breach of contract. *Bacon* v. *Walker,* 204 U. S. 311; *Reaves Warehouse Corp'n.* v. *Commonwealth,* 141 Va. 194; *Jewell Warehouse Co.* v. *Kemper,* 206 Ky. 267; *Rosenthal* v. *New York,* 226 U. S. 260; *Shurman* v. *Atlanta,* 148 Ga. 1; *Louisiana* v. *Weinstein,* 181 La. 1086; *Levi* v. *Annison,* 155 Ala. 149; *Lemieux* v. *Young,* 211 U. S. 489; *Kidd Dater & Price Co.* v. *Musselman Grocery Co.,* 217 U. S. 461; *Steele, etc. Co.* v. *Miller,* 92 O. S. 115.

Statutes closely analogous have been adopted in the cotton-growing States to prevent fraud in the sale of cotton. *Parks* v. *Laurns' Cotton Mills,* 75 S. C. 560; *State* v. *Moore,* 104 N. C. 714. See also *Minnesota ex rel. Beek* v. *Wagener,* 77 Minn. 483; *Biddles* v. *Enright,* 239 N. Y. 354; *Holsman* v. *Thomas,* 112 Oh. St. 397; *Hall* v. *Geiger Jones Co.,* 242 U. S. 539; *Caldwell* v. *Sioux Falls Stockyards Co.,* 242 U. S. 559; *Merrick* v. *N. W. Halsey Co.,* 242 U. S. 568; *Brazee* v. *Michigan,* 241 U. S. 340; *Engel* v. *O'Malley,* 219 U. S. 128.

The penalties provided in § 27 do not deny due process of law or the equal protection of the laws to warehouse-

men and auctioneers. *Fidelity Mutual Life Ass'n.* v. *Mettler,* 185 U. S. 308; *Fraternal Mystic Circle* v. *Snyder,* 227 U. S. 497; *St. Louis, Iron Mountain & Southern Ry.* v. *Williams,* 251 U. S. 63; *Chicago, N. W. Ry.* v. *Nye, Schneider, Fowler Co.,* 260 U. S. 35; *Atchison, T. & S. F. R. R.* v. *Matthews,* 174 U. S. 96; *Seaboard Air Line* v. *Seegars,* 207 U. S. 73; *St. Louis J. M. & S. R. Co.* v. *Wynne,* 224 U. S. 354; *Yazoo & M. V. R. R.* v. *Jackson Vinegar Co.,* 226 U. S. 217; *M. K. & T. R. Co.* v. *Cade,* 233 U. S. 642. Distinguishing, *Atchison, T. & S. F. Ry.* v. *Vosburg,* 238 U. S. 56. *Hartford Fire Ins. Co.* v. *Wilson Toomer Fertilizer Co.,* 4 F. (2d) 835.

The counterclaim for a declaration of rights as to the Anti-Trust Law is improper pleading. The state courts have no jurisdiction of an action for treble damages under the Sherman Anti-Trust Law.

A tortious intermeddler with the contracts between defendant in error and its members cannot raise the question of their illegality. *Northern Wisconsin Co-op. Tobacco Pool* v. *Bekkedal,* 182 Wis. 571.

Mr. Justice McReynolds delivered the opinion of the Court.

The Liberty Warehouse Company, a Kentucky corporation, operates a warehouse at Maysville in that State and there receives and sells loose-leaf tobacco for the accounts of growers. The Burley Tobacco Growers' Co-operative Marketing Association incorporated under The Bingham Co-operative Marketing Act (Ch. 1, Acts of Kentucky, 1922) commenced this proceeding against the Warehouse Company in the Mason County Circuit Court. It charged the Warehouse Company with willful violation of the Act by selling pledged tobacco, and asked judgment for the prescribed penalty ($500) and attorney's fees.

The Bingham Act (32 sections) authorizes the incorporation of non-profit, cooperative associations for the

orderly marketing of agricultural products; provides only producers may become members and that the corporation may contract only with them for marketing such products. It declares that these contracts shall not be illegal; prescribes penalties for interfering therewith, and further provides that the association shall not be deemed a conspiracy, illegal combination or monopoly. Three pertinent sections follow.

"Sec. 26. *Misdemeanor to induce breach of marketing contract of co-operative association—spreading false reports about the finances or management thereof.*

"Any person or persons or any corporation whose officers or employees knowingly induce or attempt to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof, shall be guilty of a misdemeanor and be subject to a fine of not less than one hundred ($100.00) dollars and not more than one thousand ($1,000) dollars for each such offense; and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred ($500) dollars for each such offense."

"Sec. 27. *Warehousemen liable for damages for encouraging or permitting delivery of products in violation of marketing agreements.*

"Any person, firm or corporation conducting a warehouse within the State of Kentucky who solicits or persuades or permits any member of any association organized hereunder to breach his marketing contract with the association by accepting or receiving such member's products for sale or for auction or for display for sale, contrary to the terms of any marketing agreement of which said person or any member of the said firm or any active officer or manager of the said corporation has knowledge or notice, shall be liable to the association aggrieved in a civil

suit in the penal sum of five hundred ($500) dollars for each such offense; and such association shall be entitled to an injunction against such warehouseman to prevent further breaches and a multiplicity of actions thereon. In addition, said warehouseman shall pay to the association a reasonable attorney's fee and all costs involved in any such litigation or proceedings at law.

"This section is enacted in order to prevent a recurrence or outbreak of violence and to give marketing associations an adequate remedy in the courts against those who encourage violations of co-operative contracts."

"Sec. 28. *Associations are not in restraint of trade.*

"Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this State; and the marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations."

The petition (filed Dec. 14, 1923) alleges—

That the Association was organized to provide means for orderly marketing of tobacco grown or acquired by members and no others. Identical contracts (the standard form is exhibited) with many growers obligate them to deliver to it all of their tobacco during five years. Tobacco received under these contracts is sold to manufacturers and dealers as market conditions permit and the proceeds less expenses are distributed among the members, according to quality and quantity of their deliveries.

That one Mike Kielman joined the Association and executed the standard contract. Notwithstanding this he delivered two thousand pounds of the 1923 crop to the Warehouse Company and it sold the same, with full

knowledge of the circumstances. Before the sale the Association notified the Warehouse Company of Kielman's membership and of his marketing contract, requested it not to sell his tobacco and called attention to the prescribed penalties. "Plaintiff says that after service of said notice and with the full knowledge that said tobacco had been sold to this plaintiff, the defendant knowingly persuaded and permitted the said Mike Kielman to breach his marketing contract with the plaintiff association by accepting and receiving the said member's product for sale and for auction and selling same contrary to the terms of said marketing agreement, contrary to the provisions of Sec. 27 of the Bingham Cooperative Marketing Act."

The standard contract provides—

"The Association agrees to buy and the grower agrees to sell and deliver to the Association all of the tobacco produced by or for him or acquired by him as landlord or lessor, during the years 1922, 1923, 1924, 1925 and 1926. . . . The Association agrees to resell such tobacco, together with tobacco of like type, grade and quality delivered by other growers under similar contracts, at the best prices obtainable by it under market conditions, and to pay over the net amount received therefrom (less freight, insurance and interest), as payment in full to the grower and growers named in contracts similar hereto, according to the tobacco delivered by each of them," etc.

"Inasmuch as the remedy at law would be inadequate; and inasmuch as it is now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the Association should the grower fail so to sell and deliver all of his tobacco the grower hereby agrees to pay to the Association for all tobacco delivered, consigned or marketed or withheld by or for him, other than in accordance with the terms hereof, the sum of five cents per pound as liquidated damages, averaged for all types

and grades of tobacco, for the breach of this contract; all parties agreeing that this contract is one of a series dependent for its true value upon the adherence of each and all of the growers to each and all of the said contracts.

"The grower agrees that in the event of a breach or threatened breach by him of any provision, regarding delivery of tobacco the Association shall be entitled to an injunction to prevent breach or further breach thereof and to a decree for specific performance and sale of personal property under special circumstances and conditions, and that the buyer cannot go to the open markets and buy tobacco and replace any which the grower may fail to deliver."

The Warehouse Company presented an amended answer and counterclaim in three sections.

The first sets up "in estoppel and in bar" of the alleged action that the Association since January 13, 1922, has been a trust or combination of the capital, skill and acts of divers persons and corporations doing commercial business in Kentucky and between that State and other States and foreign countries "organized and conducted for the express purpose of unlawfully and contrary to the common law, creating and carrying out restrictions in trade" under the guise of stabilizing prices.

The second asserts that Sections 26 and 27, Bingham Act, conflict with the Fourteenth Amendment, abridge defendant's privileges and immunities as a citizen of the United States, deprive it of corporate life, liberty and property without due process of law and deny it equal protection of the laws.

The third seems to be based upon the Kentucky Declaratory Judgment Law. It advances a counterclaim; also asks the court to determine whether the Bingham Act is valid and for a declaration of rights and duties.

The trial court struck section three "from the records" and sustained demurrers to sections one and two. The

Warehouse Company elected to plead no further. Trial by jury was waived "the petition being submitted to the court on the law and facts." Judgment for $500—the prescribed penalty—and $100 attorney's fees went for the Association, and was affirmed by the Court of Appeals.

In order to prevail here the Warehouse Company must show that enforcement of the challenged judgment would deprive it—not another—of some right arising under the Constitution or laws of the United States properly asserted below. *Southern Railway Co.* v. *King,* 217 U. S. 524; *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540; *Hendrick* v. *Maryland,* 235 U. S. 610, 621; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289.

No Federal right was impaired by striking section three from the amended answer and counterclaim. Proceedings in state courts must conform to the reasonable requirements of local law. Whether they do is primarily for those courts to determine. Here we find no abuse of that power.

Section three asserts—"Defendant now makes its application to this court, upon its counterclaim, in accordance with the provisions of chapter 83 of the acts of 1922 of the General Assembly of Kentucky known as the Declaratory Judgment Law for the purpose of securing a declaration of its rights and duties under said Bingham Cooperative Marketing Act, in relation to the common law and the State and Federal Constitutions, as well as the Sherman Anti-Trust Law, and for the purpose of having this court determine whether in the conduct of its business it will be necessary for it to comply with the provisions of said Bingham Cooperative Marketing Act, or whether it is invalid in whole or part, and if so, in what part."

Apparently the Declaratory Judgment statute authorizes plaintiffs only to ask for judgments. It also provides:

"The court may refuse to exercise the power to declare rights, duties or other legal relations in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action, or in any case where the declaration or counterclaim is not necessary or proper at the time under all the circumstances." This Court has no jurisdiction to review a mere declaratory judgment. *Liberty Warehouse Company* v. *Grannis,* 273 U. S. 70.

Section one presents no Federal question. It does not mention the Constitution or any statute of the United States, but claims that the Association is an unlawful trust or combination under common law rules. But the present controversy concerns a statute and a State may freely alter, amend or abolish the common law within its jurisdiction. *Baltimore & Ohio R. R.* v. *Baugh,* 149 U. S. 368, 378.

Section two challenges sections 26 and 27 of the Bingham Act because they offend the Fourteenth Amendment "in that said sections and each of them abridges defendant's privileges and immunities as a citizen of the United States and deprives defendant of its corporate life, liberty and property without due process of law and denies to it the equal protection of the laws." This suggests the only Federal questions open for our consideration. The pleadings allege no burden upon interstate commerce amounting to regulation, nor do they properly and definitely advance any claim under a Federal statute.

A corporation does not possess the privileges and immunities of a citizen of the United States within the meaning of the Constitution. *Western Turf Assn.* v. *Greenberg,* 204 U. S. 359, 363; *Selover* v. *Walsh,* 226 U. S. 112. The allegation concerning deprivation of corporate life is unimportant.

Certainly the statute impaired no right of the Warehouse Company guaranteed by the Fourteenth Amend-

ment by merely authorizing corporations with membership limited to agriculturists and permitting contracts for purchase and resale of farm products. This also is true of the declaration that such associations shall not be deemed monopolies, combinations or conspiracies in restraint of trade, and that contracts with members shall not be illegal. The state may declare its own policy as to such matters.

Sections 26 and 27 prohibit interference with contracts permitted by local law and not alleged to conflict with Federal law. Twenty-six declares any person or corporation who knowingly induces a member to break his marketing contract guilty of a misdemeanor and subjects him to a fine; also to suit for the penal sum of $500. Twenty-seven hits warehousemen who solicit, persuade or permit a member to break his marketing contract by accepting or receiving pledged products for sale and subjects them to penalties. It was under the latter section that judgment went against the Warehouse Company.

The court below affirmed "there is no statute at present in this State, nor was there any when the cause of action herein arose, against pools, trusts and monopolies." Considering this and further declarations in the same opinion, we cannot say that any common law rule recognized in the State of Kentucky forbade associations or contracts similar to those before us when intended to promote orderly marketing. Undoubtedly the State had power to authorize formation of corporations by farmers for the purpose of dealing in their own products. And there is nothing to show that since the Bingham Act producers may not form voluntary associations and through them make and enforce contracts like those expressly authorized.

Do the provisions of the Bingham Act which afford peculiar protection to marketing contracts with members of the Association deprive the Warehouse Company of

equal protection of the laws, or conflict with the due process clause of the Fourteenth Amendment because without reasonable basis and purely arbitrary? These questions may be fairly said to arise upon the present record.

The statute penalizes all who wittingly solicit, persuade, or induce an association member to break his marketing contract. It does not prescribe more rigorous penalties for warehousemen than for other offenders. Nobody is permitted to do what is denied to warehousemen. There is no substantial basis upon which to invoke the equal protection clause.

Connolly v. *Union Sewer Piper Co.*, 184 U. S. 540, is much relied upon. But there the circumstances differed radically from those here presented; and always to determine whether equal protection is denied there must be consideration of the peculiar facts. Connolly resisted judgment for the purchase price of pipe upon the ground that the Union Company, the vendor, belonged to a combination or trust forbidden by an Illinois statute. The statute defined a trust, made participation therein criminal, and directed that those who purchased articles from an offending member should not be held liable for the price. Section 9 declared—"The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." This court held that because of the exemption the Union Company was denied the equal protection of the law. It was forbidden to do what others could do with impunity. Here the situation is very different. The questioned statute undertakes to protect sanctioned contracts against any interference—no one could lawfully do what the Warehouse Company did.

Counsel maintain that the Bingham Act takes from the Warehouse Company the right to carry on business in the usual way by accepting and selling the tobacco of those

who voluntarily seek its services and thus unduly abridges its liberty. Undoubtedly the statute does prohibit and penalize action not theretofore so restricted and to that extent interferes with freedom. But this is done to protect certain contracts which the legislature deemed of great importance to the public and peculiarly subject to invasion. We need not determine whether the liberty protected by the Constitution includes the right to induce a breach of contract between others for the aggrandizement of the intermeddler—to violate the nice sense of right which honorable traders ought to observe.

In *Minnesota, etc., Marketing Association* v. *Radke* (1925) 163 Minn. 403, provisions of the cooperative marketing act of Minnesota substantially like Section 27 were declared invalid. The Supreme Court said: "It seems clear to us that it is beyond the power of the legislature to make it a tort to purchase, in the ordinary course of a legitimate business, from the true owner a wholesome staple commodity upon which there is no lien and which is not under any ban or regulation because of inherent qualities or use. Liberty of contract is assured by both state and Federal Constitutions."

On the other hand, in *Commonwealth* v. *Hodges* (1910) 137 Ky. 233, the Kentucky Court of Appeals sustained a statute which made it a criminal offense knowingly to purchase a crop pledged to an unincorporated marketing association. The same doctrine is accepted by the opinion below.

It is stated without contradiction that co-operative marketing statutes substantially like the one under review have been enacted by forty-two States. Congress has recognized the utility of co-operative association among farmers in the Clayton Act, 38 Stat. 730; the Capper-Volstead Act, 42 Stat. 388; and the Co-operative Marketing Act of 1926, 44 Stat. 802. These statutes reveal widespread legislative approval of the plan for protecting

scattered producers and advancing the public interest. Although frequently challenged, we do not find that any court has condemned an essential feature of the plan with the single exception of the Supreme Court of Minnesota in the above cited case.

In the court below it was said—

"We take judicial knowledge of the history of the country and of current events and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handlers between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well known fact that without the agricultural producer society could not exist and the oppression brought about in the manner indicated was driving him from his farm thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power."

The Supreme Court of Alabama declared in *Warren* v. *Alabama Farm Bureau Cotton Association* (1925) 213 Ala. 61—

"So far as we are advised, no American court has condemned a co-operative marketing contract of the character of this complainant association as injurious to the public interest or in any way violative of public policy. On the contrary, such contracts have been everywhere upheld as valid, if not positively beneficial to the public interest."

In *Arkansas Cotton Growers Co-op. Assn.* v. *Brown* (1925) 168 Ark. 504, the court sustained a Co-operative Marketing Act—

"The statute seems to be in a form which has become standard, and has been enacted in many of the states, the enactment of such legislation being manifestly prompted by the universal urge to promote prosperity in agricultural pursuits. There has been much discussion of the plan in the decisions of the courts of the various states where it has been adopted, and the general view expressed is that the statute should be liberally construed in order to carry out the design in its broadest scope."

In *Manchester Dairy System, Inc.* v. *Hayward* (1926) 82 N. H. 193, the Supreme Court of New Hampshire said—

"Co-operative marketing agreements, containing the essential features of the contract here considered, have been recognized in many of our states as a legitimate means of protecting its members against oppression, of avoiding the waste incident to the dumping of produce upon the market with the consequent wide fluctuations in prices and of securing to the producer a larger share of the price paid by the consumer for his products. Associations of the character here exist in practically all of our states and deal in nearly every form of agricultural product. From year to year the co-operative idea in marketing has been assuming wider scope and greater economic importance. Public approval of such co-operative organizations is evidenced by the adoption of enabling legislation in more than two-thirds of the states, including our own. . . . Such legislation has received liberal construction by the courts. *Minn. Wheat Growers' Assn.* v. *Huggins,* 203 N. W. 420, *et seq.* . . . No sufficient ground appears from the record for holding that the contract here under consideration is contrary to public policy."

Tobacco Growers' Co-op. Assn. v. *Jones,* 185 N. C. 265—

"In view of the necessity of protecting those engaged in raising tobacco against the combination of those who buy the raw product at their own figures and sell it to the public at prices also fixed by themselves, this movement has been organized. By a careful examination of all the provisions of the act under which the association is acting, it will be seen that every precaution has been taken to insure that it will not be used for private gain and can operate only for the protection of the producers."

Northern Wisconsin Co-operative Tobacco Pool v. *Bekkedal,* 182 Wis. 571—

"The reasons for promoting such legislation are generally understood. It sprang from a general, if not wellnigh universal, belief that the present system of marketing is expensive and wasteful and results in an unconscionable spread between what is paid the producer and that charged the consumer. It was for the purpose of encouraging efforts to bring about more direct marketing methods, thus benefiting both producer and consumer and thereby promoting the general interest and the public welfare, that the legislation was enacted."

The purpose of the penalty clause (Section 27) was pointed out by the Supreme Court of Tennessee. *Dark Tobacco Growers' Co-op. Assn.* v. *Dunn* (1924), 150 Tenn. 614—

"The complainant could not do business without tobacco. When it contracts to sell, it must fill its contracts with tobacco delivered by its members. It cannot replace defendant's tobacco by purchasing upon the open market. Its charter prohibits it from so doing. For each pound of tobacco which is not delivered to the association by a member, there is a *pro rata* increase in the operating costs of the association; and that increase cannot be estimated in terms of money with definite exactness. For every defection of one member, there is a certain amount

of dissatisfaction engendered among other members; indeed, other members are encouraged not to deliver their tobacco, and the normal increase of the association's members is prevented. All of these things result in damage, but the amount of damage cannot possibly be computed."

Other pertinent cases are assembled in margin.[1]

The opinion generally accepted—and upon reasonable grounds, we think—is that the co-operative marketing statutes promote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This Court has recognized as permissible some discrimination intended to encourage agriculture. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 95. *Cox* v. *Texas*, 202 U. S. 446. And in many cases it has affirmed the general power of the States so to legislate as to meet a definitely threat-

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[1] *Owen County Burley Tobacco Society* v. *Brumback*, 128 Ky. 137; *Burley Tobacco Society* v. *Gillaspy*, 51 Ind. App. 583; *Bullville Milk Producers' Assn.* v. *Armstrong*, 178 N. Y. S. 612; *Anaheim Citrus Fruit Assn.* v. *Yeoman*, 51 Cal. App. 759; *Washington Cranberry Growers' Assn.* v. *Moore*, 117 Wash. 430; *Poultry Producers of Southern California* v. *Barlow*, 189 Cal. 278; *Kansas Wheat Growers' Assn.* v. *Schulte*, 113 Kan. 672; *Brown* v. *Staple Cotton Co-op. Assn.*, 132 Miss. 859; *Oregon Growers' Co-op. Assn.* v. *Lentz*, 107 Ore. 561; *Texas Farm Bureau Cotton Assn.* v. *Stovall*, 113 Texas 273; *Potter* v. *Dark Tobacco Growers' Assn.*, 201 Ky. 441; *Tobacco Growers' Co-op. Assn.* v. *Jones*, 185 N. C. 265; *Milk Producers' Marketing Co.* v. *Bell*, 234 Ill. App. 222; *Dark Tobacco Growers' Co-op. Assn.* v. *Mason*, 150 Tenn. 228; *Rifle Potato Growers* v. *Smith*, 78 Colo. 171; *Clear Lake Co-op. Live Stock Shippers' Assn.* v. *Weir*, 200 Iowa 1293; *Minnesota Wheat Growers' Co-op. Assn.* v. *Huggins*, 162 Minn. 471; *Nebraska Wheat Growers' Assn.* v. *Norquest*, 113 Nebr. 731; *Harrell* v. *Cane Growers' Co-op. Assn.*, 160 Ga. 30; *California Bean Growers' Assn.* v. *Rindge Land & Navigation Co.*, 199 Cal. 168; *Louisiana Farm Bureau Cotton Growers' Co-op. Assn.* v. *Clark*, 160 La. 294; *List* v. *Burley Tobacco Growers' Co-op. Assn.*, 114 Ohio 361; *South Carolina Cottan Growers' Co-op. Assn.* v. *English*, 135 S. C. 19; *Tobacco Growers' Co-op. Assn.* v. *Danville Warehouse Co.*, 144 Va. 456.

ened evil. *International Harvester Co.* v. *Missouri*, 234 U. S. 199; *Jones* v. *Union Guano Co.*, 264 U. S. 171. Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between the Association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen.

The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of the statute have reasonable relation to a proper purpose. *Miller* v. *Wilson*, 236 U. S. 373, 380; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. A provision for a penalty to be received by the aggrieved party as punishment for the violation of a statute does not invalidate it. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Williams, et al.*, 251 U. S. 63, 66.

Affirmed.

DENNEY, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON, ET AL., *v.* PACIFIC TELEPHONE & TELEGRAPH COMPANY.

SAME *v.* HOME TELEPHONE & TELEGRAPH COMPANY.

APPEALS FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON.

Nos. 150 and 151. Argued January 9, 1928.—Decided February 20, 1928.

1. In a suit by a public service corporation to enjoin enforcement of rates fixed by a state commission, the federal courts will ascertain the powers and duties of the commission and the effect of its orders upon a consideration of the local constitution and statutes and the construction placed upon them by the state courts. P. 101.

2. Under the Public Service Commission Law of Washington, an order of the state Department of Public Works approving, and ordering future observance of, telephone rates that are higher than the *maxima* fixed in franchises granted the company by local municipalities, has the effect of terminating those franchise provisions and not that of introducing such approved rates as new *maxima* into the franchise contracts. P. 101.
3. Therefore, the rates so approved, when found to be confiscatory, can not be enforced as contractual. P. 102.

12 F. (2d) 279, affirmed.

APPEALS from decrees of the District Court permanently enjoining, as confiscatory, the enforcement of telephone rates which had been adjudged sufficient and ordered enforced by the Department of Public Works of the State of Washington.

Messrs. John H. Dunbar and *Arthur Schramm,* with whom *Messrs. H. C. Brodie, Thomas J. L. Kennedy, J. M. Geraghty* and *Alex M. Winson* were on the brief, for appellants.

Mr. Otto B. Rupp, with whom *Messrs. H. D. Pillsbury, Frank T. Post* and *C. M. Bracelen* were on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

It will be convenient to dispose of these causes by one opinion as was done in the court below. *Pacific Tel. & Tel. Co.* v. *Whitcomb, et al.,* 12 F. (2d) 279.

Appellees operate telephone plants in Seattle, Tacoma and Spokane, Washington, under local franchises which designated maximum permissible rates. These were granted prior to 1911, but after adoption of the present Constitution of the State.

The " Public Service Commission Law " of Washington, Ch. 117, Laws 1911 (Remington's Comp. Stat. 1922, Secs.

10349–10441), authorized a public service commission and directed that telephone rates, tolls, contracts and charges "shall be fair, just, reasonable and sufficient," etc. It further provided—

"Sec. 43. (Remington's Comp. Stat. 1922, Sec. 10379)—Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: *Provided, however,* That the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order."

"Sec. 55. (Remington's Comp. Stat. 1922, Sec. 10391)—Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any telegraph company or telephone company . . . are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of law, or that such rates, charges, tolls or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force, and fix the same by order as hereinafter provided. . . ."

Chapter 1, Laws of 1921, vested in the Department of Public Works powers theretofore entrusted to the Commission.

Control of the telephone systems owned by appellees was assumed by the Postmaster General, August 1, 1918, and retained for one year. He fixed rates for Seattle, Tacoma and Spokane higher than the maximum rates permitted by the original franchises.

The Act of July 11, 1919 (41 Stat. Ch. 10, p. 157) repealed the Act of July 16, 1918—which authorized Federal control of telephone systems—and directed that rates established by the Postmaster General should continue for four months after the termination of Federal control (July 31, 1919) unless sooner modified or changed by public authorities.

August 8, 1919, the Public Service Commission directed appellees to observe the rates established by the Postmaster General; and they continued so to do. January, 1922, the Department of Public Works by formal complaint challenged the reasonableness of these rates. In the Autumn of 1922 appellees filed schedules of proposed increased rates which were suspended. Extended hearings were had concerning the value of properties devoted to the service and the reasonableness of the rates proposed. The Department found and declared the value of the properties; also "that the existing rates are just, fair, reasonable and sufficient; that the proposed increased rates both toll and exchange, are unjust, unfair, unreasonable, and more than sufficient." And on March 31, 1923, it ordered "that the applications of respondents for increased rates be and the same are hereby denied. That the proposed increased rates in their entirety be and they are hereby permanently suspended; that the same shall not become effective, and existing rates shall remain in effect until the further order of the Department."

Shortly thereafter appellees began these proceedings in the United States District Court. They attacked the valuations by the Department and alleged that the rates designated by the order of March 31, 1923, were confisca-

tory. The matter went to a master and was heard upon his report, etc. The court approved the master's conclusions that the Department's valuations were too low and the prescribed rates were confiscatory. It accordingly adjudged the challenged order void and without effect.

The causes are here by direct appeal. The valuations approved by the court are not questioned; nor is it now claimed that the rates prescribed by the departmental order would yield adequate returns. But it is said that these rates must be regarded as contractual franchise rates and therefore they cannot be confiscatory in a constitutional sense.

Appellants maintain that under the statutes of Washington when the Department terminates a franchise rate and prescribes another the result is "simply to terminate one rate and substitute therefor a new rate, and that, after such substitution has been made, there still continues a franchise contract between the company and the city, which cannot be again changed except by the discretion of the department, and that the refusal of the department to exercise that discretion raises no question of confiscation." Here, it is asserted, the department merely refused to change existing approved rates which were higher than the maxima originally specified in the granted franchises.

The powers and duties of the Department of Public Works and the effect of its orders must be ascertained upon a consideration of the local constitution and statutes, and the construction placed upon them by the State courts. *Georgia Ry. Co.* v. *Decatur,* 262 U. S. 432, 437. *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539.

The Public Service Law authorizes investigation of existing rates and expressly directs that whenever after a hearing they are found to be unjust or insufficient to yield reasonable compensation the Department shall determine what will be just and reasonable ones thereafter to be

observed and fix the same by order. The order of March 31, 1923, in effect declared the rates then being observed just and sufficient to yield reasonable compensation. It expressly commanded their future observance and was sufficient to terminate the provisions of the franchises as to maximum rates, within the purview of Section 55, *supra.*

The Department made its investigation and order without regard to the franchise rates and treated the questions presented as unaffected thereby. It exercised the power and duty to fix reasonable and compensatory rates irrespective of any previous municipal action. We must treat the result as a bona fide effort to comply with the local statute. There is no adequate basis for the claim upon which appellants rely. See *Puget Sound Traction Co.* v. *Reynolds,* 244 U. S. 574, 578.

Much consideration was given to the Public Service Law by the Supreme Court in *State ex rel. Spokane* v. *Kuykendall,* 119 Wash. 107, 111 (1920). There a gas company operating in Spokane under a franchise which prescribed maximum rates asked for increased rates. The Commission disapproved the proposed schedule but permitted the company to charge rates declared to be just, reasonable and sufficient. These exceeded the ones theretofore charged and were above the maximum permitted by franchise. The Court said:

". . . By the act of 1911 (Laws of 1911, p. 561, § 34) the terms of a franchise contract like the one in question here are binding upon the parties until the department of public works (heretofore the public service commission) has made an order directing a departure therefrom; and, without question, the department has the right and power to order a departure. *State ex rel. Ellertsen* v. *Home Tel. & Tel. Co.,* 102 Wash. 196, 172 Pac. 899. In the case of *State ex rel. Webster* v. *Superior Court,* 67 Wash. 37, it was decided that the public service com-

mission law placed the entire subject of rate regulation under the control of the commission, that no contract between a city representing the public and a public service company would be allowed to interfere with that control, and by way of application of the rule, it was decided in that case to be the duty of the commission to the company to fix a rate which was sufficient (a rate that would afford a fair interest return on the investment), in spite of the franchise contract fixing rates which were too low. That, in legal effect, is what has been done in the present case."

Responding to an argument in behalf of the City, based upon the proviso of Section 43, *supra*, the Court further said:

"Therefrom it appears to be argued that the rates provided in the contract should continue until the commission makes an order specifically declaring and directing in so many words that the contract shall be terminated. We may overlook the fact, if need be, that, upon the petition of the city, the rates were reduced in 1913, and that in 1918 they were increased upon the application of the gas company, and consider the franchise contract as having been wholly undisturbed until the present time, and still we would be compelled to determine, as we do determine, that the present order of the department of public works is just as effective as if, after fixing the rates, there had been added therein the words 'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated,' or words of similar import. That is the legal effect of what was done, and the form or language by which it was accomplished is not very material."

In the same cause the Gas Company maintained that the rates prescribed by the Commission's order were inadequate for its needs and unjust. This matter was carefully considered upon the merits, but the opinion nowhere suggests that the rates prescribed should be treated as if

specified in the franchise and obligatory upon the Company whether compensatory or no.

Affirmed.

MR. JUSTICE STONE took no part in the consideration of this case.

BRIMSTONE RAILROAD AND CANAL COMPANY *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

No. 240. Argued October 10, 11, 1927.—Decided February 20, 1928.

1. An order of the Interstate Commerce Commission reduced the divisions of joint rates accorded a short line railroad by an agreement with its connections, and thus increased theirs correspondingly, upon a finding that the share of the short line exceeded a fair return on its property over cost of service and was tantamount to a rebate to a mining company which owned its stock and contributed most of its traffic. The finding was based on a study of the short line's property and affairs; the service it performed; divisions established by the United States Railroad Administration; other divisions, past and present; volume and distribution of traffic; comparison between the questioned divisions and those received by other lines in the same territory; and testimony that competition controlled the agreed divisions; but there was no evidence that the connecting carriers were in need, or received, or would receive, more than or less than a fair return from the agreed divisions; that the joint rates themselves were unfair or unjust, or that the agreed divisions were "unjust, unreasonable, inequitable or unduly preferential or prejudicial as between the carriers." The order was made retroactive to the date when the investigation was instituted by the Commission. *Held:*

(1) That as items definitely specified by § 15 (6) of the amended Act to Regulate Commerce were not considered, the order must be annulled. *New England Divisions Case*, 261 U. S. 184; *United States* v. *Abilene & Southern Railway*, 265 U. S. 274, distinguished. P. 115.

(2) Section 15 (6) grants no power to require readjustment between carriers of past receipts from agreed joint rates. P. 117.

(3) Section 15 (6) authorizes the Commission to readjust divisions already received only when the joint rate was established pursuant to a finding or order of the Commission made under § 15 (1) or (3), after full hearing in respect of the specific rate. Mere permission granted by the Commission to increase or diminish all rates according to the needs of carriers throughout the country, is not enough. P. 125.

17 F. (2d) 165, reversed.

APPEAL from a decree of the District Court sustaining an order of the Interstate Commerce Commission in a suit brought by the appellant to annul it. The nature of the order is fully explained in the opinion.

Mr. C. R. Liskow, with whom *Messrs. James T. Kilbreth* and *Wylie M. Barrow* were on the brief, for appellant.

The Commission is without power to determine the divisions, except as between the carriers party to the rates, and except after a hearing and investigation of the operating expenses, taxes and other facts and circumstances connected with the operation of each of the several carriers participating in such joint rates. *Akron, etc.* v. *United States,* 261 U. S. 184; *United States* v. *Abilene & Southern Ry.,* 265 U. S. 274.

The Commission is without power to establish divisions of joint through rates to be applied prior to the date of its final order and retroactively unless and until the joint rates, of which such divisions form a part, have been established pursuant to a finding or order of the Commission, which must have been made under the provisions of § 15 (3) of the Interstate Commerce Act. The lower court erred in holding that the increase in rates allowed by *Ex Parte 74 Increased Rates,* 58 I. C. C. 220, was the establishing of joint rates. *Virginia Railroad Co.* v. *United States,* 272 U. S. 658.

The report and order of the Commission, of December 14, 1925, results in the taking of the property of the

Brimstone without due process of law and the confiscation thereof in violation of the Fifth Amendment.

The divisions received by the Brimstone had all been proportionately reduced by § 15 (2) of the Interstate Commerce Act before collection, and the Government has appropriated the excess net railway operating income of the Brimstone over 6 per centum per annum on the value of the carrier's property used in the service of transportation.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

The Commission not only had the authority, but it was its duty, to investigate and consider the one enterprise and single investment which is the dominant feature of this case. It falls clearly within a line of cases in which the one enterprise and single investment arrangement has been condemned repeatedly. *United States* v. *Koenig Coal Co.,* 270 U. S. 512; *The Tap Line Cases,* 234 U. S. 1; *O'Keefe* v. *United States,* 240 U. S. 294; *Manufacturers Rwy.* v. *United States,* 246 U. S. 457. See also *Industrial Rwys. Case,* 29 I. C. C. 213; *Id.* 32 I. C. C. 129; *Second Industrial Rwys. Case,* 34 I. C. C. 596; *Chicago, West Pullman & Southern R. R.,* 37 I. C. C. 558; *Chestnut Ridge Rwy.,* 41 I. C. C. 62; *Chestnut Ridge Rwy.* v. *United States,* 248 Fed. 791; *Louisiana & Pine Bluff Rwy.* v. *United States,* 257 U. S. 114; *Northampton & Bath R. R.* 41 I. C. C. 68; *Owasco River Rwy.,* 53 I. C. C. 104; *Lake Erie & Fort Wayne R. R.,* 58 I. C. C. 558; *Birmingham Southern R. R.* v. *Director General,* 61 I. C. C. 551.

If the Commission must keep the case open in order that new testimony may be taken each year, and from year to year, on operating expenses or other subjects, it would be impossible to fix the divisions. The statute does not require that hearings shall be perennial. There

is no presumption that the Commission was considering matters *aliunde*.

The Commission had the authority under the statute to make its order effective as of August 1, 1921, the date of the order of investigation, and the District Court was right in so holding.

If appellant, by the order of the Commission, has received all it is entitled to under the law, the adequacy or inadequacy of the amounts left for Louisiana Western and Kansas City Southern would seem to be a matter with which appellant has no concern. *New England Divisions Case*, 261 U. S. 184; *United States* v. *Abilene & Southern Ry.*, 265 U. S. 274.

Mr. D. W. Knowlton, with whom *Messrs. E. M. Reidy* and *P. J. Farrell* were on the brief, for the Interstate Commerce Commission.

Where the need for action is merely the fixing of an industrial short-line's division, the Commission may fix separately such division while regarding the remainder of the joint rate as a joint division or joint proportion going to the carriers participating in the traffic beyond the industrial carriers' junction with the connecting trunk line, and in such case due consideration is given to the factors named by respectively considering the adequacy with relation to those factors of the separate division for the individual needs of the industrial carrier on the one hand and the adequacy with relation to those factors of the remaining proportion for the joint needs of the remaining carriers on the other.

Where the separate fixing of an industrial carrier's division results in an increased proportion going to the trunk-line carriers, due consideration of the factors named does not require the submission of the same involved cost studies and detailed evidence in respect of the thousands of miles of road operated by the trunk lines as was found

practicable in separately fixing the division of the industrial line, for, on the one hand, the interests of the trunk lines and that of the public in their efficient service has been promoted by the action taken, and, on the other hand, the fair return of the industrial line and interest of the public in its efficient service has been safeguarded by careful consideration given to detailed evidence.

In reducing the Brimstone's division and consequently fixing an increased proportion for the remaining carriers, the Commission gave, with relation to the factors named, the due consideration to the Brimstone's requirements and to the joint requirements of the remaining carriers which the Act called for under the circumstances obtaining.

Such adjustment of divisions was not retroactive in the sense that it took from the Brimstone, revenue to which it was ever properly entitled.

The divisions and adjustment thereof ordered by the Commission, were of joint rates established pursuant to findings or orders rendered by the Commission in certain general rate-group proceedings, known as *Increased Rates, 1920,* 58 I. C. C. 220; and *Reduced Rates, 1922,* 68 I. C. C. 626, thereby strictly conforming not only with the letter of the divisions paragraph of the Act, but to its purpose as well, which is particularly directed toward effecting distribution commensurately with individual carrier needs of revenues derived from rates established in just such general rate-group proceedings, wherein aggregate carrier needs and property values constitute the prescribed rate bases and individual carrier needs are necessarily disregarded for the time being.

Mr. Justice McReynolds delivered the opinion of the Court.

Appellant seeks annulment of an Interstate Commerce Commission order, entered December 14, 1925, which designated the divisions it might thereafter receive from

agreed joint rates and required readjustment of divisions received subsequent to August 1, 1921, when the investigation began.

The Court below dismissed the bill. Two of the objections to the order, there advanced, will be considered.

1. The Commission failed to investigate or determine the reasonableness or justness of the divisions, or whether they were unjust, unreasonable, inequitable, or unduly preferential or prejudicial, as between the carriers; also failed to consider whether the circumstances entitled one to a greater or less proportion than another of the joint rates, as commanded by Section 15(6), Transportation Act, 1920. (41 Stat. c. 91, p. 456.)

2. The joint rates were agreed upon by the parties and not " established pursuant to any finding or order " of the Commission, within Section 15(6), Transportation Act, 1920. Consequently, the Commission had no power to require adjustments for any period prior to the final order.

Section 1(4) Transportation Act, 1920, directs common carriers to establish through routes, reasonable and equitable rates, fares and charges; also to establish divisions of joint rates just, reasonable and equitable as between the participants, which shall not unduly prefer or prejudice any of them.

Section 15(1) empowers the Commission whenever, after full hearing, it shall find any rate charged by a carrier is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential, or prejudicial, or otherwise in violation of this Act, to determine and prescribe the just and reasonable rate thereafter to be observed, and to make an order requiring the carrier to cease and desist from such violation.

Section 15(3) provides that " the Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing," establish joint

rates, "and the division of such rates, fares, or charges as hereinafter provided."

Section 15(6)—

"Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle

one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

Appellant owns and operates a railroad ten miles long in southwestern Louisiana, is a common carrier of freight only, and makes interchanges with lines of the Southern Pacific[1] and Kansas City Southern. Except five shares, its capital stock—$200,000—is owned by Union Sulphur Company, which operates mines near its line and consigns and receives over ninety per centum of the property moving thereon. Prior to 1920 appellant and connecting carriers established through rates and divisions by agreements. These were modified as permitted or suggested in Ex Parte 74 (1920) 58 I. C. C. 220, and Matter of Reduced Rates (1922) 68 I. C. C. 676.

In Ex Parte 74, the Commission considered applications under section 15a,[2] Transportation Act, 1920, for authority generally to increase rates so that carriers as a whole might earn a fair return. It found, (July 29, 1920, 58 I. C. C. 220, 246, 245):

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[1] The lines of the Louisiana Western Railroad are part of the Southern Pacific System.

[2] Transportation Act, 1920—

Sec. 15a [Added February 28, 1920]

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

". . . The following percentage increases in the charges for freight service, including switching and special services, together with the other increases hereinbefore approved, would under present conditions result in rates not unreasonable in the aggregate under section 1 of the act and would enable the carriers in the respective groups, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, to earn an aggregate annual railway operating income equal, as nearly as may be, to a return of 5½ per cent. upon the aggregate value, for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation and one-half of 1 per cent. in addition: eastern group, 40 per cent.; southern group, 25 per cent.; western group, 35 per cent.; Mountain-Pacific group, 25 per cent.

"After carefully considering the situation we find that with the exceptions hereinafter noted general percentage increases made to fit the needs of the groups of lines serving each of the four groups must be considered for present purposes the most practicable. This conclusion is without prejudice to any subsequent finding in individual situations."

And it accordingly authorized general increases as specified "in the rates, fares and charges of railroads within the continental United States." It did not approve or require the adoption or maintenance of any particular rate.

In the Matter of Reduced Rates, (May 16, 1922, 68 I. C. C. 676)—instituted to determine whether further general reductions might be required under section 1, also what would constitute fair return under section 15a(3)—after referring to the authorized increases of 1920, the Commission found that 5.75 per centum would be fair thereafter and would result if formerly authorized rates were reduced by specified percentages. The order was that carriers should promptly report "whether the

findings herein will be carried into effect without formal order or orders by us." It did not require the adoption or maintenance of any rate, nor was any particular rate approved.

August 1, 1921, the Commission began "an investigation into and concerning the justness, reasonableness, and equitableness of the divisions received by the Brimstone Railroad & Canal Company out of the joint rates applicable to the transportation of property." It ordered "that the Brimstone Railroad and Canal Company, the Southern Pacific Company and The Kansas City Southern Railway Company be and they hereby are made respondents to this proceeding."

Testimony was taken relative to ownership and organization of the Brimstone Company; its relation to Union Sulphur Company; its operating and financial condition, including dividends, surplus, and character of service performed; volume of road-building material carried for Parish purposes; establishment by United States Railroad Administration of divisions with connecting lines, with factors considered in connection therewith; comparison between the questioned divisions and those received by other lines in the same territory; also value of operating property, including cost of reproduction.

The Commission's first report—April 4, 1922—declared the Brimstone Company a common carrier subject to the interstate commerce act entitled to participate in joint rates, or have its charges absorbed under appropriate tariff provisions. And further:

"The divisions to the Brimstone should produce no more than an amount sufficient to cover the cost of its service and a fair return upon the property held for and used in the service of transportation. We conclude that the facts of record, including the dividends paid by the Brimstone in past years and the accumulated credit balance to profit and loss, indicate divisions to the Brimstone

which are disproportionate, in view of the service rendered, and are tantamount to a rebate to the proprietary company.

"We find that the divisions of joint rates now received by the Brimstone from the two other respondents on interstate traffic are, and for the future will be unjust, unreasonable, inequitable, and to the extent that they exceed or may exceed the cost of the service and a fair return upon the property held for and used in the service of transportation for the public generally, are excessive, and, in effect, amount to a rebate to the proprietary company. It does not necessarily follow that reasonable and equitable divisions to the Brimstone should be on the maximum basis.

"The record will be held open for a period of ninety days from the date of service of this report, during which respondents will be expected to make the necessary cost studies for the purpose of arriving at reasonable divisions to the Brimstone."

The subsequent studies related only to the Brimstone Company; they did not extend at all to connecting carriers. The Commission (88 I. C. C. 58, March 10, 1924) said they were "intended to develop the average cost, including return on investment, of moving loaded cars to and from the Southern Pacific and Kansas City Southern." No studies were made or evidence taken concerning efficiency of Southern Pacific and Kansas City Southern lines, amount of revenue required to pay their respective operating expenses, taxes, and fair return upon their property, or the public importance of services performed by them, or any other fact or circumstance (except as shown above) which ordinarily, without regard to the mileage haul, would entitle them to a greater or less proportion of the joint rate. Section 15(6).

March 10, 1924, a second report and order prescribed what the Brimstone Company might thereafter receive

from joint rates and ordered readjustment of divisions received after August 1, 1921. No change was directed in the joint rates or finding made relevant to their justness, nor was there any pronouncement concerning apportionments amongst other carriers. The Commission said:—

"Based upon the cost of the service and a fair return upon the property held for and used in the service of transportation for the public generally, we find that during the period from August 1, 1921, to but not including July 1, 1922, just, reasonable and equitable divisions to the Brimstone would have been: (Here follows certain specific divisions) . . ."

"We further find that on and after July 1, 1922, just, reasonable and equitable divisions to the Brimstone were, are and for the future will be: (Here follows certain specific divisions) . . . ."

"We further find that the divisions received by the Brimstone should be adjusted on a basis not in excess of the charges above found just, reasonable and equitable during the periods named."

On December 14, 1925, a final report and order reaffirmed the order of March 10, 1924, with some modifications (presently unimportant) in amounts allowed the Brimstone Company from the joint rates.

The Commission evidently undertook to deprive the Brimstone Company of receipts supposed to exceed a fair return on its property and award the same to connecting carriers without evidence tending to show they were in need or had or would receive more or less than a fair return from agreed divisions, or that the joint rates themselves were unfair and unjust, or that the agreed divisions were "unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers."

Counsel suggest that in addition to facts revealed by studies of the Brimstone Company's affairs, the Commission did consider existing division sheets of joint rates,

volume and distribution of traffic, past division sheets, divisions accorded to the Brimstone Company by the Federal Director-General, also testimony showing competition controlled the agreed divisions. But the very definite command of Section 15(6) required more than that.

Both parties rely upon *New England Divisions Case,* 261 U. S. 184, and *United States* v. *Abilene & Southern Ry. Co.* 265 U. S. 274.

The first involved an order granting larger divisions to New England roads. We there recognized the necessity of evidence "typical in character and ample in quantity to justify the findings made in respect to each division of each rate of every carrier," and declared that with such evidence before it the Commission properly proceeded to consider the importance to the public of the weak carriers and directed divisions intended to effectuate the purpose of Congress to insure adequate transportation service for the whole country, by extending aid to them. Nothing in the opinion supports the view that the Commission may take something from one carrier merely because its net revenue appears unduly large and donate this to another demanding nothing and not in need. Cost of service to one carrier is not the only factor to be considered in determining just divisions.

In the second case the Commission undertook to modify existing divisions for the benefit of a weak road. It did not appear that any matters consideration of which was required by Section 15(6) Transportation Act, 1920, had been ignored, but the evidence concerning some of these things had not been properly presented and therefore the order was annulled. It was there said: (284) "Relative cost of service is not the only factor to be considered in determining just divisions." (291) "The power conferred by Congress on the Commission is that of determining, in respect to each joint rate, what divi-

sions will be just. Evidence of individual rates or divisions, said to be typical of all, affords a basis for a finding as to any one. But averages are apt to be misleading. It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of the traffic on joint rates appears to be unjust. These aggregate results should properly be taken into consideration by the Commission; but it was not proper to accept them as a substitute for typical evidence as to the individual joint rates and divisions. In the *New England Divisions Case,* tariffs and division sheets were introduced which, in the opinion of the Commission were typical in character, and ample in quantity, to justify the findings made in respect to each division of each rate of every carrier. A like course should have been pursued in the proceeding under review."

The record discloses that before making the challenged order the Commission failed to consider the items definitely specified by Section 15(6). And it must be annulled.

The Court below gave special attention to the second of the above stated objections to the order. This relates only to the retroactive feature. And it approved what we regard as an erroneous view touching readjustments of past divisions announced by the Interstate Commerce Commission in several proceedings. *Pittsburg, etc., Ry. Co.* v. *Pittsburg Company,* 61 I. C. C., 272; *Western Maryland Ry. Co.* v. *Pennsylvania Railroad Co.,* 69 I. C. C. 703, 707; *New York Dock Ry. Co.* v. *Baltimore & Ohio R. R.* 89 I. C. C. 695; and *Marion & Eastern Ry. Co.* v. *C. & E. I. R. R. Co.,* 96 I. C. C. 402.

Prior to 1920, the interstate commerce act contained the following provisions concerning the readjustments of divisions of rates determined and prescribed by the Commission:

"Sec. 15. That whenever, after full hearing . . . the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, . . . are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, . . . and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, . . . *Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.* . . . . . ."

An explanation of the meaning of and reasons underlying that part of Section 15 italicized above appears in *Morgantown & Kingwood Divisions*, 40 I. C. C. 509, 510:

"The provision dates back to the time when the Commission, under section 15 of the original act, had no authority to deal with rates except upon formal complaint. It now constitutes a part of that section, as amended, which gives us power to require, after hearing either upon formal complaint or in a proceeding instituted on our own motion, the establishment and maintenance of joint rates lower than the aggregate of the intermediate rates or joint rates already in effect, or proposed by the carriers in tariffs under suspension. It does not come into play until, as a condition precedent, the Commission has made some re-

quirement after full hearing. The reason therefor, as we understand it, is to provide a means of determining which carrier, or to what extent each carrier, shall bear an enforced reduction or participate in an approved increase in the existing or proposed through charge. In other words, the Commission, in creating a joint rate or in reducing a joint rate below what had been established voluntarily or is proposed by the carriers, having brought about a situation different from that as to which their agreement applied and not in contemplation when the agreement was made, is to have the power to complete what it has undertaken, in case the carriers themselves do not find it possible to agree upon the divisions of the new rate."

"The language of the act [1917] seemed to indicate that the authority was to be exercised only when the parties failed to agree among themselves, and only in supplement to some order fixing the rates." *New England Divisions Case,* 261 U. S. 194.

The occasion for the changes incorporated in Section 15(6)—Act 1920—were pointed out before the House Committee by Interstate Commerce Commissioner Clark, July 16, 1919 (House Hearings, Return of Railroads, etc., Vol. 1, page 29). He said—

"There has been a good deal of difference of opinion, both inside and outside of the commission, as to its powers under the present act. The act now authorizes the commission to establish joint rates and says that if the carriers are not able to agree on a division of the rates so prescribed, the commission may determine those divisions and its decision relative thereto shall become effective as a part of the original order and as of the date upon which the rates became effective. But there have come up questions as to divisions of rates which had not been prescribed by the commission and which had become unsatisfactory to one or possibly more than one carrier.

The commission originally held that it did not have jurisdiction to prescribe the divisions of a joint rate that had not been prescribed by it. [*Morgantown & Kingwood Divisions, supra*] Thereafter, the dissatisfied carrier could bring that question at issue by filing a revocation of its concurrence in the rates, or if it happened to be a carrier that published the rates, by filing a cancellation of them. That was frequently protested, often suspended by the commission, and upon hearing it developed that the only difficulty was their differences as to divisions of rates. Requiring them by order to continue the rates was, in effect, establishing those rates as joint rates, and we thereupon proceeded to prescribe the divisions, if they could not agree.

"Later, by a majority vote, the commission decided that it had power to prescribe the divisions, even if it had not prescribed the rates [*Morgantown & Kingwood Divisions,* 49 I. C. C. 540]; but that has not as yet come to rest through any final adjudication.

"Under this amendment the commission would be authorized to prescribe the divisions of the joint rates, fares, and charges as between the carriers, whether it prescribed the rates or not, and it is provided that if it be a rate, fare, or charge that has been prescribed by the commission, it may then, by order, make its division of that rate retroactive to the date upon which the rate prescribed by it became effective; but as to rates not prescribed by the commission, its order prescribing the divisions of the rate would be effective only from the effective date of the order."

Reporting in behalf of the House Committee—(Nov. 10, 1919, H. R. Vol. 2, Reports on Public Bills)—Chairman Esch said:—

"Section 417 amends section 15 of the commerce act so as to give the commission power not only to fix the maxi-

mum rate, but to fix the particular rate to be charged, or the maximum, or the minimum, or the maximum and minimum. . . .

"The amendment also increases the powers of the commission in regard to making of through routes and joint rates, authorizing it to prescribe the joint rate or the maximum, or the minimum, or the maximum and minimum. The commission is authorized to prescribe just and reasonable divisions of joint rates among the several carriers and where the joint rate was fixed by the commission and the divisions are found to have been unjust, the commission may determine what would have been the just division thereof, and require adjustment to be made."

Section 15(6) should be construed in the light of the recognized difficulties. Under the earlier act a clear distinction was made between joint rates "agreed upon" and those "determined and prescribed" by the Commission after full hearing "to be thereafter observed." The Commission had power to declare proper divisions of those in the latter category by order "which shall take effect as part of the original order"—that is from the date the rate was prescribed. Whether it could determine divisions of agreed rates for the future was not clear; but certainly it could not require readjustments of divisions of such rates for past periods. *Morgantown & Kingwood Divisions*, 40 I. C. C. 509, 49 I. C. C. 540, 551. Section 15(6) established the right to prescribe future divisions of agreed rates, but we think the studied purpose was to grant no power to require readjustments of past receipts from agreed joint rates. Theretofore power in respect of past divisions existed only when rates had been determined and prescribed after full hearing—that is where the commission had passed upon the reasonableness of the rate and required observance. Obviously a carrier may have

assented to a through rate only because of the divisions accorded to it: to permit the Commission to change this arrangement as to past transactions would be exceedingly harsh if not wholly unreasonable. Ordinarily, divisions of a particular rate are not of public interest if the rate itself is reasonable. Probably aware of hardships under the old rule, the new act shortened the time during which readjustment might be required—limited its beginning to the commencement of investigation or filing of complaint.

In support of the retroactive provision of the present order counsel say that joint rates between the Brimstone Company and connecting carriers were made under authority of *Ex Parte 74*, 58 I. C. C. 220, and *Matter of Reduced Rates*, 68 I. C. C. 676, and therefore were "established pursuant to a finding or order of the Commission." But mere general permission or suggestion concerning rates for all carriers, without consideration of the reasonableness of any particular rate, is not the "finding or order" referred to by Section 15(6). We think that refers to one which, after full hearing, determined and prescribed a rate thereafter to be observed. The contrary view would place substantially all presently existing rates in the class with particular rates established by order of the Commission after full hearing, subject them to retroactive adjustments, and thus destroy the practical value of the distinction which Congress carefully preserved.

The power to require readjustments for the past is drastic. It may reasonably exist in cases where the particular rate has been approved by the Commission after full hearing: it ought not to be extended so as to permit unreasonably harsh action without very plain words. The general findings and permission of Ex Parte 74 and Matter of Reduced Rates did not approve or fix any particular rate and certainly did not determine and prescribe the rates divisions of which are here under consideration.

Neither case approved "any specific rate as reasonable in itself or as properly adjusted with respect to other rates nor did it justify in advance any rate which might be published as a result thereof." In them the Commission was dealing with the whole body of rates throughout the country—was looking at the general level of all rates and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration. See *Morgantown & Kingwood Divisions,* 40 I. C. C. 511; *Globe Soap Co.* v. *A. & S. Ry. Co.,* 40 I. C. C. 121; *Steel & Tube Co.* v. *Director General,* 61 I. C. C. 526.

Section 15(1) Transportation Act, 1920, authorizes the Commission, after full hearing, to determine and prescribe joint rates to be thereafter observed. Section 15 (3) permits the Commission, after full hearing, to establish joint rates "and the divisions of such rates, fares or charges as hereinafter provided." And Section 15 (6) authorizes readjustments of divisions already received only when the joint rate was established pursuant to a finding or order of the Commission. Such finding or order must have been under Section 15(1) or (3)—after full hearing in respect to the specific rate. This construction will insure compliance with the purpose of Congress by requiring the Commission, upon full hearing, to pass upon the particular rate before divisions for the past can be directed. Mere permission to increase or diminish all rates according to the general needs of carriers throughout the country is not enough.

The decree below must be reversed. The cause will be remanded there for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS dissent.

GULF FISHERIES COMPANY *v.* MacINERNEY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 178. Argued January 16, 1928.—Decided February 20, 1928.

A state license tax upon dealing in fish, regulated according to the weight sold, is not unconstitutional as applied to imported fish which, when the tax attaches, have lost their distinctive character as imports and have become, through processing, handling and sale, a part of the common property of the State. P. 126.
17 F. (2d) 374, affirmed.

APPEAL from a decree of the District Court of three judges, denying a final injunction and dismissing the bill in a suit by the Fisheries Company to enjoin the defendant, a county attorney, from instituting criminal proceedings to enforce payment of a tax.

Mr. Brantley Harris for appellant.

The fish handled by appellant are imports. *Gulf Fisheries Co.* v. *Darrouzet,* 17 F. (2d) 374; *United States* v. *Sischo,* 262 U. S. 165; *Brown* v. *Maryland,* 12 Wheat. 419.

They have not become so mingled with the common mass of property in the State as to lose their character as imports, and their exemption from state taxation. *Brown* v. *Maryland, supra; Low* v. *Austin,* 13 Wall. 29; *Sonneborn Bros.* v. *Keeling,* 262 U. S. 506; *Cook* v. *Pennsylvania,* 97 U. S. 566; *Galveston* v. *Mexican Petroleum Corp'n,* 15 F. (2d) 208.

The fish are at all times in actual transportation. They must pass from ship to express car, and they do this over the terminals of the Galveston Wharf Company. To say that their decapitation works such a change as to cause them to become a part of the general property of the State is to look at form rather than substance.

Mr. D. A. Simmons, with whom *Mr. Claude Pollard* was on the brief, for appellee.

Mr. Justice Brandeis delivered the opinion of the Court.

The general statutes of Texas provide that no person shall engage in the business of wholesale dealer in fish without procuring a license from the Game, Fish and Oyster Commissioner; that the licensee shall pay a tax of one dollar for each 1,000 pounds of fish handled by him; and that failure to pay the tax shall constitute a misdemeanor for which the person offending may be punished. Texas Penal Code, 1925, Art. 936.

The Gulf Fisheries Company, a New York corporation engaged in the wholesale fish business at Galveston, Texas, brought this suit against the County Attorney, in the federal court for southern Texas. The bill alleged that, as applied to the plaintiff, the above statute is void, as it lays an impost on imports and burdens foreign and interstate commerce, thus violating the Federal Constitution; that, because the statute is void, plaintiff refused to pay the tax demanded; that, because of its refusal, criminal proceedings are threatened; and that, unless these are enjoined, plaintiff will be subjected to irreparable injury to an amount exceeding $3,000. Both an interlocutory and a final injunction were prayed for. A temporary restraining order issued. An application for the interlocutory injunction was made and heard before three judges under § 266 of the Judicial Code. The defendant moved to dismiss the bill; and also answered. Upon final hearing before the three judges the "temporary injunction" was dissolved; the final injunction was denied; and the bill was dismissed. 17 F. (2d) 374. The case is here on direct appeal from the final decree. *Smith* v. *Wilson,* 273 U. S. 388; *Clark* v. *Poor,* 274 U. S. 554.

Here, the only claim made by the Company is that the statute as applied lays an impost on imports. The County Attorney denies that the fish taxed are imports; insists that even if they are imports, the tax is valid as a license fee exacted to defray the cost of inspection; and contends that the imposition is, in any event, valid, because the fish, before the tax is laid, become mingled with the common mass of property in the State and thus lose their character as imports and their exemption from state taxation. We have no occasion to enquire whether the fish are imports. Nor need we enquire whether the statute could be sustained as an inspection law. On the facts agreed, the tax is not laid until the fish have lost their alleged distinctive character as imports and have become, through processing, handling and sale, a part of the mass of property subject to taxation by the State. The facts are these:

The fish are caught in the Gulf of Mexico and are landed, in bulk, by the fishing boats on the wharf of the Galveston Wharf Company. That is the Gulf Fisheries Company's only place of business. And there it has the privileges required for the conduct of its business. It has space for unloading the fish; has several large bins or ice-boxes for storage, handling and re-icing; has space for loading fish on express cars; and has space for the office work incident to the loading, selling and shipping. After the fish are unloaded from the vessels, all are weighed and washed. All are immediately re-iced to prevent spoiling. About 75 per cent. are there beheaded and gutted; 7 to 10 per cent. are gutted and gilled with heads on; the remainder are left for sale without beheading or removing gills or entrails. All, except 15 or 20 per cent. which are sold to wholesale dealers within the city, are put into barrels, loose with ice, ready for shipment in

filling orders. None are placed in cold storage plants. All are shipped from the wharf as fast as they can be re-iced, washed, handled and loaded as above stated. Nearly all are shipped on the day they are unloaded from the boats. Occasionally, some are held in the ice boxes on the wharf for more than forty-eight hours. All are sold to wholesale dealers in quantities of from 50 to 400 pounds. None are sold to retailers.

The tax is laid, not according to the weight of the fish when landed, but upon the fish sold.[1] All that is sold, has been handled as above stated. None of it has remained in its original condition. None is in an original package, and little in its original form. This is obviously true of the 75 per cent. which is beheaded and gutted and of the 7 to 10 per cent. more which is gutted and gilled with the heads on. But the small remainder is, when sold, no longer in its original condition. Before sale, it is washed and re-iced. It is taken from the bulk and put loose with ice in barrels. And all this has been done on the wharf. These facts make inapplicable cases like *Brown* v. *Maryland,* 12 Wheat. 419; *Low* v. *Austin,* 13 Wall. 29; *Cook* v. *Pennsylvania,* 97 U. S. 566. All the fish sold have, after landing and before laying the tax, been so acted upon as to become part of the common property of the State. They have lost their distinctive character as imports and have become taxable by the State. Compare *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506.

Affirmed.

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[1] Compare *Adams Fish Market* v. *Sterrett,* 106 Tex. 562, 563–4; Texas Revised Civil Statutes (1911) Art. 3987; Texas Penal Code (1911) Art. 917; Texas General Laws, 1913, c. 135, p. 272 (Art. 917), c. 146, p. 299 (Art. 3987); Texas General Laws, 1919, c. 73, Art. 16; Texas General Laws, 1925, c. 178, p. 439 (Art. 16).

RICHARDSON MACHINERY COMPANY *v.* SCOTT.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 198. Submitted January 17, 1928.—Decided February 20, 1928.

1. By the law of Oklahoma, where a person against whom a default judgment is rendered files a petition to vacate the judgment upon the ground that the court had no jurisdiction of the defendant, and the petition is based also on non-jurisdictional grounds, such as that the judgment was obtained by fraud or that the party was prevented from defending by unavoidable casualty or misfortune, the filing of the petition operates as a voluntary general appearance, with the same effect as if such appearance had been made at the trial. P. 133.
2. A judgment based on this ground is not reviewable by this Court, although in rendering it the state court also overruled the petitioner's contention that the service of process in the action was void under the Fourteenth Amendment. P. 133.

Certiorari to 122 Okla. 125, dismissed.

CERTIORARI, 274 U. S. 729, to a judgment of the Supreme Court of Oklahoma, affirming a judgment which denied the petition of a foreign corporation to set aside a default judgment rendered in an action based on substituted service of summons.

Messrs. D. Haden Linebaugh and *Paul Pinson* were on the brief for petitioner.

Messrs. Jean H. Everest and *Charles L. Moore* were on the brief for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

A statute of Oklahoma provides that if a foreign corporation doing business within the State fails to appoint an agent upon whom service may be made, process served upon the Secretary of State shall be sufficient to give jurisdiction of the person to any court having jurisdiction of

the subject matter. Compiled Oklahoma Statutes (1921) §§ 5436, 5442.

In September, 1920, Scott, a resident of Oklahoma, brought in a district court of the State an action of contract against the Geo. O. Richardson Machinery Co., a Missouri corporation. He alleged in his petition that the defendant was a foreign corporation doing business in Oklahoma and that it had failed to appoint an agent upon whom process might be served. He asked leave to serve the summons upon the Secretary of State as provided in the statute. There was a praecipe for summons pursuant to the statute; the summons issued; and it was served as in the statute provided. The defendant having failed to enter an appearance within the time limited, judgment by default was, in October, 1920, entered for the amount claimed.

In July, 1921, which was after the expiration of the term at which the judgment was entered, the corporation filed what it called a "Special appearance and motion to quash summons and service thereof and to set aside and vacate judgment." The motion set forth that the corporation had not had actual notice of the action or the judgment; that, for this reason, it had not had an opportunity to defend; that it had and has a valid defense to the cause of action sued on; that it is not indebted to the plaintiff in any amount; and that if it had had notice, it would have interposed a defense. It alleged further that it had never engaged in business within the State; that it does, and has done, with residents of Oklahoma a purely interstate business; that the Secretary of State was not by contract or law its agent upon whom service could be made; that the statute authorizing service upon the Secretary of State was, as applied to it, a violation of the due process clause of the Fourteenth Amendment; and that the trial court had no jurisdiction. It prayed that the

summons and return be quashed and that the judgment rendered be set aside.

The proceedings which followed the filing of this motion to quash and vacate extend over a period of more than six years. The report of them occupies more than 200 pages of the printed record. Immediately after filing the motion, the corporation sought from the state district court, and obtained, an order removing the cause to the federal court on the ground of diversity of citizenship. There the case was heard on the motion to quash the summons and vacate the judgment. On April 27, 1922, after proceedings which it is unnecessary to detail, the federal court remanded the cause to the state court, because the petition for removal had not been filed in time.

On June 1, 1922, the case came on for hearing in the state court on the motion to quash the summons and to set aside the judgment. The motion was overruled; and exceptions were allowed. Then the corporation was granted leave to file instanter a petition, under § 810 of the Compiled Statutes (1921), to vacate the judgment. That section provides that the district court shall have power in nine classes of cases to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made. Among these are: "Fourth. For fraud, practiced by the successful party, in obtaining the judgment or order," and "Seventh. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending."

On the same day, a new pleading entitled "Petition to Vacate Judgment" was filed. This petition did not contain an allegation that the corporation's appearance was special and solely to contest the jurisdiction of the court; nor did it seek to quash the summons issued and served. In addition to allegations made in the motion filed in July, 1921, the new petition alleged that the service was based

upon an allegation fraudulently made that the corporation was engaged in business in Oklahoma within the meaning of the statute relative to service; that the judgment was rendered upon false and fraudulent testimony given in support of the allegation that the defendant was indebted to the plaintiff; that in fact plaintiff was indebted to the corporation in the sum $29.10; that if it, the corporation, violated the state law by failing to appoint an agent, it had done so unconsciously; that in any event it was entitled to be notified of the pendency of the action; that by fraud the plaintiff concealed from it the fact that the action had been instituted; and that there was no duty devolving upon the Secretary of State to notify it. It alleged further, as required by § 814 of the Compiled Statutes, that it had a meritorious defense; that this would have been interposed if it had known of the pendency of the action; that if permitted now to appear and defend, it could and would establish the defense. Annexed to the petition was a copy of the answer which the corporation proposed to file if its prayer to vacate the judgment should be granted. This answer included a counterclaim for the small balance alleged to be due to the corporation. The petition alleged further that a levy upon the corporation's property to enforce the judgment was threatened; offered a bond conditioned to pay the judgment, if sustained; and prayed for a stay of execution pending a hearing on the petition to vacate. As final relief the petition prayed that the judgment be vacated; that the corporation be permitted to file the answer annexed and make proper defense; and that it have other and proper equitable relief.

To this petition to vacate a demurrer was interposed. There was a hearing upon the demurrer; it was sustained; the petition was dismissed, upon refusal of the corporation to plead further; and on June 19, 1922, a stay of the exe-

cution, pending an appeal, issued. In October, 1924, the Supreme Court of Oklahoma reversed the judgment dismissing the petition to vacate. Its decision was rested solely upon the ground that, under the statute, the Secretary of State was required to give the defendant corporation notice of the service of the summons upon him; that he had failed to do so; that, since the corporation lacked actual knowledge, there was an "unavoidable casualty or misfortune preventing the party . . defending" as defined in sub-paragraph Seventh of § 810 of the Compiled Statutes of Oklahoma; and that, therefore, the case should be remanded for further proceedings. In December, 1925, a rehearing was granted.

In November, 1926, the Supreme Court of Oklahoma reversed itself and affirmed the judgment of the trial court dismissing the petition to vacate. 122 Okla. 125. In its second opinion it recited the claim that the statute authorizing service upon the Secretary of State violated the due process clause of the Fourteenth Amendment; stated that the validity of the statute had been sustained in *Title Guaranty & Surety Co.* v. *Slinker,* 42 Okla. 811, which was binding upon it; and then, exercising jurisdiction, it held that relief could not be had under clause Seventh of § 810, because the corporation's lack of knowledge of the commencement of the action was not due to "unavoidable casualty or misfortune" but to its own failure to appoint an agent as required by the law of the State. As leading to that conclusion, it held further that the Secretary of State was not under a duty to send notice of the summons.

This Court being of opinion that the constitutionality of the statute concerning service, as so construed, was questionable, and that the question of its validity was one of general importance, granted the petition for a writ of certiorari. 274 U. S. 729. Further study of the record discloses that the discussion by the state court of this

constitutional question was unnecessary to the result reached by it. The jurisdictional question—and hence the constitutional question—had already been eliminated earlier in the opinion. For the court had held that by filing the petition to vacate under § 810, the corporation had, in effect, entered a general appearance. This was true, because embodied in the petition were several non-jurisdictional grounds of relief, including, among others, fraudulent conduct on the part of the plaintiff and the meritoriousness of the corporation's defense; and because the corporation sought affirmative relief against the original plaintiff.

Since the founding of the State, it has been the settled law of Oklahoma that where a person against whom a judgment is rendered files a petition to vacate the judgment upon the ground that the court had no jurisdiction of the defendant, and the petition is based also on non-jurisdictional grounds, such as those mentioned in sub-paragraphs Fourth and Seventh of § 810, the filing of the petition operates as a voluntary general appearance, with the same effect as if such appearance had been made at the trial.[1] It was probably because this rule had been so long settled, that the Supreme Court of Oklahoma deemed it unnecessary to enlarge upon the subject or to cite any of the many cases in which the rule had been acted on.

As the decision of that court was rested, and may rest, on this rule—an adequate non-federal ground—the writ must be dismissed, *Bilby* v. *Stewart,* 246 U. S. 255, 257; *Doyle* v. *Atwell,* 261 U. S. 590, 591.

Dismissed.

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[1] *Rogers* v. *McCord-Collins Mercantile Co.,* 19 Okla. 115, 118; *Lookabaugh* v. *Epperson,* 28 Okla. 472; *Welch* v. *Ladd,* 29 Okla. 93, 98; *Ziska* v. *Avey,* 36 Okla. 405, 408; *Pratt* v. *Pratt,* 41 Okla. 577; *Hill* v. *Persinger,* 57 Okla. 663; *Myers* v. *Chamness,* 102 Okla. 131; *Burnett* v. *Clayton,* 123 Okla. 156.

BROWN *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 33. Argued October 14, 1927; reargued January 4, 1928.—Decided February 20, 1928.

1. The provisions of the Sherman Anti-Trust Act creating criminal and civil liability against unincorporated associations, necessarily carry the implication that they may be proceeded against by their common names to enforce the liability. P. 141.
2. In grand jury proceedings under the Sherman Act, a subpœna *duces tecum* without an *ad testificandum* clause may issue to an unincorporated association and be served upon the officer of the association who has possession of the documents. P. 142.
3. A subpœna *duces tecum* commanding an association of manufacturers to produce all letters and telegrams, or copies thereof, passing between it and its predecessors, their officers and agents, and the several members of such association, and the officers and agents of such members, during a specified period of five and one-half months, relating to the manufacture and sale of a specified class of goods, and particularly with reference to certain specified meetings and activities and aspects of the trade involved, *held* not too broad. P. 142.
4. That the subpœna in this case was not objectionable is established by the fact that, prior to its issue, the documents called for had been identified and produced, without undue interference with the affairs of the association, under another subpœna containing the same description. P. 143.
5. To support a claim that documents called for by a subpoena will tend to incriminate him, the witness must produce them for inspection by the court, and his refusal to do so in itself constitutes a failure to show reasonable ground for not complying with the writ. P. 144.
6. In the absence from the record of anything but the witness's mere assertion to show that his claim of privilege against production of documents was justified, it may be assumed, upon review of a judgment committing him for contempt, that, by inspection of the documents or by other facts, a want of substance in the claim was disclosed to the District Court. P. 145.

Affirmed.

REVIEW of a judgment of the District Court sentencing Brown for criminal contempt in refusing to comply with a subpoena *duces tecum*. The case first reached this Court upon a certification of questions from the Circuit Court of Appeals. After argument, the entire record was ordered up and the case was reargued.

Mr. Robert N. Golding, with whom *Mr. Weymouth Kirkland* was on the brief, for Brown.

The outstanding difference between an unincorporated association and a corporation, is that the former, like a partnership, is not a separate entity and possesses no individuality. It cannot, as such, own property; it cannot enter into contracts; it cannot sue in the name its members have assumed for business purposes; nor can it, in the absence of statute, generally be sued by such name. *Society of Shakers* v. *Watson,* 68 Fed. 730; *Moskal* v. *New Era Commercial Ass'n,* 228 Ill. App. 278; *Pickett* v. *Walsh,* 192 Mass. 572; *In re Waters of Willow Creek,* 119 Ore. 487; *Brown* v. *Protestant Episcopal Church,* 8 F. (2d) 149; *Cousin* v. *Taylor,* 115 Ore. 472; *Thurmand* v. *Cedar Spring Baptist Church,* 110 Ga. 816; *Tucker* v. *Eatough,* 186 N. C. 504; *State* v. *Stock Exchange,* 211 Mo. 181.

The law has not been changed by the *Hale* and *Coronado* cases. This Court has not endowed unincorporated associations with individuality. The reasoning of the *Hale* case does not apply to this case. *Hale* v. *Henkel,* 201 U. S. 43; *Wilson* v. *U. S.,* 221 U. S. 361; *U. S.* v. *Brasley,* 268 Fed. 59; *Karges Furniture Co.* v. *Amalgamated Union,* 165 Ind. 421. The *Coronado* case is based upon the familiar theory of presence by representation. *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Beatty* v. *Kurtz,* 2 Pet. 566; *Spaulding* v. *Evenson,* 149 Fed. 713, affd., 150 Fed. 517; *Nat'l Harness Mfrs. Ass'n,* v. *Federal Trade Comm.,* 268 Fed. 705; *Iron Molders Union* v. *Allis-Chalmers Co.,* 166 Fed. 45; *Bobe* v.

Lloyds, 10 F. (2d) 731; *United States and Cuba, etc.,* v. *Lloyds,* 291 Fed. 889.

Corporate records may be reached by subpoena, whether the custodian thereof be another corporation, a partnership, or an individual. *U. S.* v. *Invader Oil Corp.,* 5 F. (2d) 715; *Woodworth* v. *Old Second Nat'l Bank,* 154 Mich. 459; *Martin* v. *D. B. Martin Co.,* 10 Del. Ch. 211.

Corporations and individuals may become members of unincorporated associations, in which case, the books and records belong to the individuals as well as to the corporations. *Houston* v. *Dexter & Carpenter,* 300 Fed. 354; *Quitman Oil Co.* v. *McRee,* 18 Ga. App. 128; *Salem-Fairfield Ass'n* v. *McMahan,* 78 Ore. 477; *Wilson* v. *Carter Oil Co.,* 46 W. Va. 469; *Amusement Syndicate Co.* v. *Martling,* 108 Kans. 798; *Moore* v. *Hillsdale County Co.,* 171 Mich. 388; *Browning* v. *Cover,* 108 Pa. 595; 14a C. J. 293.

A subpoena would compel Brown to produce his own documents, for use against himself in a criminal proceeding, in violation of his constitutional rights. *Ballman* v. *Fagin,* 200 U. S. 186; *U. S. Brasley,* 268 Fed. 59; *Internal Revenue Agent* v. *Sullivan,* 287 Fed. 138.

The subpoena was too broad. *Hale* v. *Henkel,* 201 U. S. 43; *In re American Sugar Refining Co.,* 178 Fed. 109; *Rawlins* v. *Halls-Epps Co.,* 217 Fed. 884; *Ex parte Jaynes,* 70 Cal. 638; *Ex parte Gould,* 60 Tex. Cr. R. 442; *American Car Co.* v. *Water Co.,* 221 Pa. 529; *State* v. *Davis,* 117 Mo. 614.

No showing of materiality was made. *Miller* v. *Mutual Life Ass'n,* 139 Fed. 864; *U. S.* v. *Terminal Ass'n,* 154 Fed. 268; *Dancel* v. *Goodyear Shoe Machinery Co.,* 128 Fed. 753; *State* v. *Wurdeman,* 176 Mo. App. 540; *Kullman, Salz & Co.* v. *Superior Court,* 15 Cal. App. 276.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* and *Messrs. Rush H. Williamson* and *Ralstone R. Irvine,* Special Assistants to the Attorney General, were on the brief, for the United States.

The subpoena was not invalid because directed at a voluntary association. *Wheeler* v. *United States,* 226 U. S. 478; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344. Compiled Laws of Mich., 1915, §§ 12363 and 12432.

There was not an unreasonable search and seizure in the sense that the subpoena was too broad or too indefinite. *Hale* v. *Henkel,* 201 U. S. 43; *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541; *Wilson* v. *United States,* 221 U. S. 361.

Brown failed to sustain the burden of showing justification for refusal to produce by failing to show that he was a member of the association and that its members were not corporations. *Wilson* v. *United States, supra; Hale* v. *Henkel, supra.* See also *Essgee Co.* v. *United States,* 262 U. S. 151; *Grant* v. *United States,* 227 U. S. 74; *Wheeler* v. *United States,* 226 U. S. 478.

Mr. Justice Sutherland delivered the opinion of the Court.

This case came here from the circuit court of appeals upon a certificate submitting questions upon which instruction was desired. After argument upon the certificate, it was ordered that the entire record be certified to this Court so that the whole matter in controversy might be considered.

The questions to be determined upon that record arise upon the following facts: The district court for the northern district of Illinois on July 13, 1925, issued its subpoena, addressed to the National Alliance of Furniture

Manufacturers, commanding it to appear before the grand jury at a time and place named and produce:

"All letters or copies of letters, telegrams or copies of telegrams, incoming and outgoing, passing between the National Alliance of Furniture Manufacturers and its predecessor, the National Alliance of Case Goods Associations, their officers and agents, and the several members of said National Alliance of Furniture Manufacturers and its predecessor, the National Alliance of Case Goods Associations (including corporations, partnerships, and individuals, and their respective officers and agents) during the period from January 1, 1922, to June 15, 1925, relating to the manufacture and sale of case goods, and particularly with reference to—

"(a) general meetings of Alliance
"(b) zone meetings of Alliance members
"(c) costs of manufacture
"(d) grading of various types of case goods
"(e) issuing new price lists
"(f) discounts allowed on price lists
"(g) exchanging price lists
"(h) maintaining prices
"(i) advancing prices
"(j) reducing prices
"(k) rumors of charges of price cutting
"(l) discounts, terms and conditions of sale, etc.
"(m) curtailment of production
"(n) the pricing of certain articles or suits of furniture by W. H. Coye
"(o) cost bulletins
"(p) intention of W. H. Coye and A. C. Brown to attend furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill., and New York City, N. Y., and meetings of members held prior to and during said furniture markets or expositions

"(q) conditions obtaining at various furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill., and New York City, N. Y.,

"(r) manufacturers maintaining a fair margin of profit between cost prices and selling prices."

The subpoena contained no *ad testificandum* clause.

Service of this subpoena was made upon Arthur C. Brown, Secretary of the Alliance, who appeared in person before the grand jury; refused to say anything concerning the matters set forth in the subpoena unless he should first be subpoenaed and sworn; produced and read to the grand jury a written statement in which, after reciting the service of the subpoena upon him, he said that there was no such person or entity as the National Alliance of Furniture Manufacturers capable of being served with subpoena or of appearing in answer to one, and that he appeared in deference to the official position of the grand jury to inform them of that fact. He declined to say whether his refusal to obey the subpoena was because to do so would incriminate him in connection with his private and personal affairs. Counsel for the Government informed him that the requirements of the subpœna were not with reference to his private or personal affairs but concerned him only as he was connected with the affairs of the Alliance. The grand jury presented Brown to the district court as a contumacious witness and requested that steps be taken to compel him forthwith to comply with the requirements of the subpoena.

To this presentment, Brown filed an answer admitting service of the subpoena upon him, his appearance in person before the grand jury, and the making of the written statement above referred to. He further stated that the Alliance was a voluntary organization of furniture manufacturers, and not a corporation, either *de jure* or *de facto;* that the matter then under investigation by the grand

jury was the same matter as had been investigated by a previous grand jury, which had returned an indictment in which he, Brown, was named as a defendant; that prior to the issue of the subpoena in question, a subpoena *duces tecum* had been served upon him directed to and commanding him to produce the same documents; that in answer thereto he appeared before the grand jury and brought with him the documents so requested, but declined to answer questions propounded unless sworn as a witness; that, thereupon, he was excused from further attendance upon the grand jury. He further answered that "said organization being a voluntary one and not a corporation," to compel him in response to the subpoena set forth to produce documents in his possession would be to compel him to submit to an unlawful seizure and to produce evidence against himself, in violation of Amendments IV and V of the federal Constitution; that said subpoena failed to show that the documents described were important or material; that it was a blanket command to produce all letters or copies of letters and telegrams sent to or received from a large number, to-wit, 192 persons during a period of more than three years, and called for many documents obviously harmless and of no evidentiary value; and that said subpoena was not a bona fide attempt to obtain evidence, but constituted a fishing expedition, undertaken without knowledge whether or not he had in his possession evidence desired by the United States or the grand jury, but undertaken in the hope that evidence might be discovered which could be used against him on trial of the pending indictment or under a new one.

After a hearing, the court held that no sufficient excuse in law had been shown, and ordered Brown, then present in court, forthwith to appear before the grand jury and produce the evidence called for in the subpoena, whether the grand jury saw fit to administer an oath to him or not.

Subsequently, Brown again appeared before the grand jury and, being asked to produce the documentary evidence called for in the subpoena, refused to do so except upon condition that he should be subpoenaed and sworn. He was again presented to the district court as a contumacious witness, and as for a criminal contempt for the last mentioned refusal to comply with the requirements of the subpoena. Upon this presentment, the court adjudged Brown guilty of contempt and sentenced him to imprisonment for thirty days.

The contentions on Brown's behalf are—

(1) The subpoena was a nullity because directed to an unincorporated association; (2) it was invalid because too broad and indefinite; (3) the order of the district court compelled Brown to produce his own papers and thereby submit to an unlawful seizure and to incriminate himself in violation of his constitutional rights.

1. The general rule is that in the absence of statute an unincorporated association is not a legal entity which may be sued in the name of the association. Many of the states have adopted statutes expressly providing that such associations may be sued. But an express provision is not indispensable. Such a suit may be maintained in virtue of a necessary implication arising from statutory provisions although the statute does not in terms so provide. Here, such an implication arises from the provisions of the Sherman Anti-Trust Act, c. 647, 26 Stat. 209. The act denounces as illegal every contract, combination and conspiracy in restraint of interstate and foreign trade, and provides that every person who shall make any such contract or engage in any such combination or conspiracy shall be guilty of a misdemeanor. Section 8 of the act provides that the word person shall be deemed to include corporations and *associations* existing under or authorized by the laws of the United States, of any territory, state or foreign country. That the Alliance

was an association within the meaning of this section and, therefore, subject to the provisions of the act is clear. The provisions of the act creating criminal and civil liability against such an association necessarily carry the implication that it may be proceeded against by its common name to enforce the liability. Consequently, for a violation of the Anti-Trust Act, it may be prosecuted, indicted and convicted, and judgment rendered against it and satisfied by execution out of its assets. *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 385–391, 392; *Dowd* v. *United Mine Workers of America*, 235 Fed. 1, 5–6. To say that an association thus may be prosecuted, indicted, convicted, fined and judgment satisfied, and that appropriate process may be issued and executed to these ends but that a subpoena *duces tecum* without an *ad testificandum* clause (*Wilson* v. *United States*, 221 U. S. 361, 372) cannot in the course of the very proceeding go against it by its common name, would be to utter an absurdity. While the subpoena *duces tecum* directed to the officer in possession of the documents would have been good, and perhaps preferable, the matter is not one of substance, but purely of procedure, and we entertain no doubt that the subpoena here directed to the association and served on such officer is valid.

2. In *Hale* v. *Henkel*, 201 U. S. 43, here cited in support of Brown's second contention, this Court held that a subpoena *duces tecum* requiring a witness to produce all understandings, contracts and correspondence between a corporation named and six different companies, as well as all reports made and accounts rendered by them from the date of the organization of the corporation, and all letters received by the corporation since its organization from more than a dozen different companies, was too sweeping to be regarded as reasonable. The limitation in respect of time embraced the entire period of the corporation's existence and there was no specification in re-

spect of subject matter; and this Court said that if the return had required the production of all the books, papers and documents found in the office of the corporation, it would scarcely be more universal in its operation, or more completely put a stop to the business of the company. The subpoena here under consideration is very different. It specifies a reasonable period of time and, with reasonable particularity, the subjects to which the documents called for relate. The question is ruled, not by *Hale* v. *Henkel,* but by *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541, 553–554, and *Wheeler* v. *United States,* 226 U. S. 478, 482–483, 489.

But the form of the subpoena aside, it appears from Brown's own statement that, prior to the issue of the subpoena in question, a subpoena *duces tecum* had been directed to and served upon him personally, commanding him to produce the same documents, and that in answer thereto he had appeared before the grand jury with them. This is equivalent to a demonstration that the description contained in the subpoena was sufficient to enable Brown to know what particular documents were required and to select them accordingly. Having produced them once without difficulty and without undue interference with the affairs of the association, so far as appears, there is no reason why he should not produce them again in response to another subpoena identical in terms. See *Lee* v. *Angas,* L. R. 2 Eq. 59, 64; *Starr* v. *Mayer & Co.,* 60 Ga. 546, 549.

The probable materiality of the documents is sufficiently indicated by the descriptions of their subject matter contained in the subpoena.

3. Whether Brown's relation to the association or to the documents in question was such as to entitle him under any circumstances to assert the constitutional privilege, we do not find it necessary to inquire. All other matters aside, it is impossible for us to say, upon the record before

us, that the claim of such privilege was sustained. Upon Brown's appearance before the grand jury in response to the subpoena, he made no claim of the privilege, but insisted only that there was no such person or entity as the National Alliance capable of being served with a subpoena or of appearing in answer to one. This notwithstanding the fact that his attention was directed to the subject of self-incrimination. Upon his presentment to the district court as a contumacious witness, he answered, among other things, that to compel him to produce the documents set forth in the subpoena would be to submit to an unlawful seizure and to produce evidence against himself. There was a hearing, but the record fails to disclose what was before the court for its consideration upon that hearing. It appears only that the court held that no sufficient excuse for Brown's conduct had been shown, and he was ordered to again appear before the grand jury and produce the documents called for, whether that body saw fit to administer an oath to him or not. Appearing before the grand jury, he again refused, except on condition that he should be subpoenaed and sworn. Thereupon, he was adjudged by the district court to be in contempt for his failure to comply with its order, and sentenced to imprisonment.

Whether the papers were produced for the inspection of the court does not appear, but it may well be that they were and that from an examination of them it appeared that the claim of privilege was wholly without merit. In any event it was Brown's duty to produce the papers in order that the court might by an inspection of them satisfy itself whether they contained matters which might tend to incriminate. If he declined to do so, that alone would constitute a failure to show reasonable ground for his refusal to comply with the requirements of the subpoena. *Consolidated Rendering Co.* v. *Vermont, supra,* pp. 552–553. As very pertinently said by the Court of

Appeals of Kentucky in *Commonwealth* v. *Southern Express Co.*, 160 Ky. 1, 3: ". . . the individual citizen may not resolve himself into a court and himself determine and assert the criminating nature of the contents of books and papers required to be produced." See also, *Ex parte Irvine*, 74 Fed. 954, 960; *United States* v. *Collins*, 145 Fed. 709, 712; *Mitchell's Case*, 12 Abb. Pr. 249, 260–261. And see generally, *Blair* v. *United States*, 250 U. S. 273, 282.

From the foregoing we may properly assume in support of the judgment below that either from an inspection of the papers or from other facts appearing there was disclosed to the district court a want of substance in Brown's claim of privilege. Certainly there is nothing in the record, beyond Brown's mere assertion, that affirmatively shows or tends to show that the claim was well founded.

Judgment affirmed.

KORNHAUSER v. UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 162. Submitted January 12, 1928.—Decided February 20, 1928.

Claimant successfully defended an accounting suit brought by his former law partner respecting shares of stock which claimant had received for professional services, performed by him, as the partner alleged, during the existence of the partnership, or, as claimant maintained, after its termination. *Held* that, in computing claimant's net income under the Revenue Act of 1918, the attorney's fees paid by him in defense of the suit were deductible from gross income, not as a loss under § 214 (a) (4), but as an "ordinary and necessary expense" incurred in carrying on a business, under § 214 (a) (1); that it was not within § 215, forbidding deduction of "personal, living, or family expenses." P. 152.

62 Ct. Cls. 647, reversed.

CERTIORARI, 273 U. S. 692, to review a judgment of the Court of Claims denying a claim for an amount paid under an increased income tax assessment.

Mr. L. L. Hamby was on the brief for petitioner.

"The test is whether an expense is incurred primarily because of business as the immediate cause of incurring the expenditure." T. D. No. 451, C. B. No. 2, p. 157. See also C. B. No. 5, p. 121.

What is a loss arising from business? The petitioner did not voluntarily make this expenditure as an investment for the purpose of acquiring any property, but involuntarily in defense of a spurious claim for an accounting. The amount so expended was a total loss, the antithesis of an investment, and it cannot be recovered, nor was the petitioner compensated therefor by insurance or otherwise.

All expenditures made by an individual are in a sense personal, because they are made by the individual and no one else. We interpret the meaning of §§ 214 and 215 of the statute to be that, if the expenditure by an individual, which must of necessity be personal, arose in connection with, or as the direct result of, engaging in trade or business, not involving the making of an investment resulting in the acquisition of property, it is deductible; but if it bore no relation to his business or trade it is not deductible.

The doctrine *noscitur a sociis* is peculiarly applicable in interpreting what was meant by "personal, family or living expenses." "Personal" means an expenditure relating to the person himself, and not the business in which he is engaged, and contemplates expenditures for clothing, recreation and amusement, and the innumerable other expenses in which a person may indulge voluntarily for pleasure or because of a duty. A family expense is one which a person incurs on behalf of his family unrelated

to his business. It may be for the support of his family in the purchase of food and clothing, or be for amusement or recreation of his family, or medical attendance or any other expense relating to the person. A living expense we interpret to mean one which is incurred in defraying the cost of subsistence of the person or the subsistence of the person's family.

Clause (b) of § 215 seems to be in the nature of a limitation or exception to the provisions of § 214, and therefore to be strictly construed.

Laemmle v. *Eisner,* 275 Fed. 504; and *Lewellyn* v. *Electric Reduction Co.,* 275 U. S. 243, distinguished.

Solicitor General Mitchell and *Mr. Sewall Key,* Attorney in the Department of Justice, for the United States, submitted a brief prepared by the Bureau of Internal Revenue which is printed in condensed form below,[1] and

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[1] All expenses to be deductible must come clearly within the provisions of § 214. The fee paid was not a loss under subsections. (4) or (5).

The serious question in this case arises when it is sought to place this transaction on one side or other of the line drawn by the statute between "ordinary and necessary expenses paid or incurred in carrying on any trade or business," on the one hand, and "personal, living, or family expenses," on the other. This line is shadowy, for many transactions partake of the nature of both classes of expenses. Some accurate and unvarying standard is undoubtedly intended. That standard, it is submitted, is the implications of words in the common understanding. The common understanding of the phrase "business expense" is very aptly described in the regulations (1921 ed.), promulgated by the Commissioner. Art. 101, Reg. 45; Art. 101, Reg. 62; and Art. 101, Reg. 69. See also 1 C. B. 101.

The statute requires that expenses to be deductible, must be both "ordinary" and "necessary." By implication, extraordinary and unnecessary expenditures in the maintenance and operation of a business, are excluded. *Chapin* v. *Irwin,* 3 Am. Fed. Tax Rep. 3429; *Laemmle* v. *Eisner,* 275 Fed. 504.

The defense of this suit for an accounting must be attributable to a purpose to protect property, or to vindicate reputation. The latter

also the following expression of their own views concerning the question at issue:

"We are not in accord with the reasoning of the brief prepared by the Bureau of Internal Revenue, nor with the conclusion reached by the Court of Claims, but feel bound to submit the case to this Court for decision. A judgment based on a confession of error would not bind the Court of Claims in other like cases. The Bureau of Internal Revenue believes that the decision of the Court of Claims is right. There does not seem to be any third class of expenditures between ordinary business expenditures on the one hand and personal expenditures on the other. The expenditure in this case does not seem like a personal expense in any proper sense. It was an individual expense as distinguished from a firm expense, but that is a different matter. We infer that the shares of stock received by petitioner in 1918 were received as

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is by its expression clearly a personal expense, and the former is not only a personal expense, but also a capital expense, the deduction of both of which is expressly forbidden by § 215 (a), (b) and (c) of the Revenue Act of 1918. *Appeal of Hewes,* 2 B. T. A. 1279; *Appeal of Cons. Mut. Oil,* 2 B. T. A. 1067; *Appeal of Palmer,* 3 B. T. A. 403.

The statute moreover provides that to be deductible, the expense must be incurred in carrying on a business. Defending the action against him was a single isolated transaction, and a loss incurred in such transaction is not deductible. See *Mente* v. *Eisner,* 266 Fed. 161. Here the most that can be said for the taxpayer is that he was put to an expense in winding up or closing out the business. The alleged misappropriation of moneys was not said to have been in the course of his business, but in the course of his previously existing partnerhip business. Whether he won or lost the suit for an accounting would not affect his present business or its profit, as is demonstrated by assuming that at the dissolution of the old partnership a new one had been formed between the taxpayer and persons other than his former partner. Clearly the new partners would not have benefited or suffered from the outcome of the suit for an accounting or been called upon to pay any part of the attorney's fee expended in defending said action.

compensation for some services performed, and that the question between him and his former partner was whether the services were performed during the existence of the partnership or afterwards, or disconnected with it. If that be so, the value of the shares constituted taxable income and the expenditure of attorney's fees in defending the right to receive and retain that income would have been to enlarge the taxpayer's income subject to income taxes. An expenditure for the purpose of obtaining or retaining taxable income does not seem like a personal expenditure.

We agree with the Court of Claims that the expenditure did not constitute a loss.

If the expense was a business rather than a personal expense, it can hardly be treated as a capital expenditure. While the petition in the Court of Claims is not clear, it may be that the shares of stock received were as compensation for legal or other services. Money expended to obtain or retain taxable income should be treated as a deduction from income and not as a capital expenditure.

We refer to the regulations of the Treasury Department and illustrations as to the rulings heretofore made in the Bureau of Internal Revenue on this subject. *Personal and Family Expenses,* Art. 291, Reg. 45; *Capital Expenditures,* Art. 293, Reg. 45.

The Commissioner of Internal Revenue has ruled the following to be personal expenses: (1) Amounts paid as damages for breach of promise to marry, C. B. 2, p. 157; (2) attorney's fees and costs in such an action, C. B. II–2, p. 61; (3) amounts expended in defending a suit for damages alleged to have been caused by the negligent operation of an automobile owned and operated for personal convenience, C. B. 4, p. 159; (4) attorney's fees paid by retail druggist in connection with a prosecution for illegal sale of narcotics, C. B. 4, p. 209; (5) trial expenses and

attorney's fees in defending a member of a partnership against criminal charges for violation of the Alien Property Act, C. B. IV–1, p. 170.

The Board of Tax Appeals has held the following to be personal expenses: (1) Expense of defending an indictment for perjury growing out of taxpayer's business, *Appeal of Sara Backer et al.*, 1 B. T. A. 214; (2) expense of defense in proceedings for violation of criminal provisions of the Trading with the Enemy Act. *Appeal of Norvin R. Lindheim*, 2 B. T. A. 229.

The Commissioner of Internal Revenue has held attorney's fees and legal costs in the following cases to be business expenses: (1) Defending title to a patent, C. B. 2, p. 105; (2) defending suit for damages by a tenant working on the taxpayer's farm, C. B. 5, p. 121; (3) defending a suit against doctor for malpractice, C. B. V–1, p. 227; (4) defending disbarment proceedings against an attorney, C. B. V–1, p. 227, reversing C. B. IV–1, p. 140.

The Board of Tax Appeals has held to be business expense the cost of an accounting required by court order to be made at the expense of the taxpayer to ascertain damages resulting from his infringement of a patent. *Appeal of Meyer & Bro. Co.*, 4 B. T. A. 481.

The Commissioner of Internal Revenue has held to be capital expenditures: (1) Attorney's fees paid by a nonresident alien in securing return of property and income from the Alien Property Custodian, C. B. 5, p. 127; (2) Cost of perfecting or defending title to property or reducing an assessment for a local benefit against it, C. B. 3, p. 192; see C. B. I–2, p. 146; (3) Cost of contesting a will, whereby title and possession of property were obtained, C. B. II–1, p. 122.

The Board of Tax Appeals has held that attorney's fees or other legal expenses are capital expenditures in *Appeal of Charles P. Hewes*, 2 B. T. A. 1279; *Appeal of*

Cons. Mut. Oil Co., 2 B. T. A. 1067; *Appeal of Earl M. Palmer*, 3 B. T. A. 403.

The only court decision bearing on the question here under consideration is *Laemmle* v. *Eisner*, 275 Fed. 504, which held that attorney's fees paid in litigation for control of certain stock, resulting in practically the ownership or control thereof and the consequent management of the company, constituted a capital investment rather than a business expense.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The petitioner sued in the Court of Claims to recover $1,126.15, the amount by which his income tax for the year 1918 was increased by reason of the refusal of the Commissioner of Internal Revenue to allow a deduction from the petitioner's gross income of the sum of $10,000 claimed as a business expense for that year. The petition alleges that the latter sum was paid by petitioner for attorney's fees incurred in the defense of a suit against him for an accounting instituted by his former co-partner, said suit growing directly out of the conduct of the partnership business, it being alleged by the co-partner that petitioner had collected fees or compensation for professional services performed during the existence of the partnership to a division of which the co-partner was entitled; that the alleged fees in fact consisted of stock in a corporation acquired subsequently to the dissolution of the partnership and not for services performed during its existence; that the defense to the suit was successful and the amount paid was a necessary expense incurred in connection with petitioner's business within the meaning of § 214(a), subd. (1), of the Revenue Act of 1918, or a loss within the meaning of subd. (4) of the same section; that a claim for refund of the excessive tax was duly made to the Commissioner and by him rejected. To this peti-

tion a demurrer was interposed and by the court below sustained and the petition dismissed on the ground that the expenditure was not an allowable deduction under either provision of the statute, but was a personal expense under § 215(a) of the Revenue Act of 1918. 62 C. Cls. 647.

We think it is obvious that the expenditure is not a loss; and the only provisions of the Revenue Act (c. 18, 40 Stat. 1057, 1066, 1069) which need be considered are § 214(a), subd. (1), which reads:

"Sec. 214. (a) That in computing net income there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, . . .

and § 215(a) which provides:

"Sec. 215. That in computing net income no deduction shall in any case be allowed in respect of—

"(a) Personal, living, or family expenses."

On the case made by the petition the expenditure in question was either a personal expense or a business expense:—it was not a living or family expense. And it was an "ordinary and necessary" expense, since a suit ordinarily and, as a general thing at least, necessarily requires the employment of counsel and payment of his charges. The petition is not as definite as it might have been, but from its allegations, interpreted as the Solicitor General concedes they may be, it appears that the accounting suit presented the question whether the compensation in respect of which the co-partner sought an accounting was for professional services performed by petitioner during the existence of the partnership or after its termination, the defense to that suit being based upon the latter alternative. In either view, the compensation constituted business earnings.

The Solicitor of Internal Revenue in a recent opinion has held that legal expenses incurred by a doctor of medicine in defending a suit for malpractice were business expenses within the meaning of the statute. In the course of the opinion it was said that such expenditures were as much ordinary and necessary business expenses as they would be if made by a merchant in defending an action for personal injuries caused by one of his delivery automobiles, and that in the latter case the deduction would be allowed without question. C. B. V.-1, p. 226.

Another departmental ruling is to the effect that legal expenses incurred in defending an action for damages by a tenant injured while at work on the taxpayer's farm are deductible as a business expense. C. B. 5, p. 121.

In the *Appeal of F. Meyer & Brother Co.*, 4 B. T. A. 481, the Board of Tax Appeals held that a legal expenditure made in defending a suit for an accounting and damages resulting from an alleged patent infringement was deductible as a business expense.

The basis of these holdings seems to be that where a suit or action against a taxpayer is directly connected with, or, as otherwise stated (*Appeal of Backer*, 1 B. T. A. 214, 216), proximately resulted from, his business, the expense incurred is a business expense within the meaning of § 214(a), subd. (1), of the act. These rulings seem to us to be sound and the principle upon which they rest covers the present case. If the expense had been incurred in an action to recover a fee from a client who refused to pay it, the character of the expenditure as a business expense would not be doubted. In the application of the act we are unable to perceive any real distinction between an expenditure for attorney's fees made to secure payment of the earnings of the business and a like expenditure to retain such earnings after their receipt. One is as directly connected with the business as the other.

Judgment reversed.

BOUNTIFUL BRICK COMPANY ET AL *v.* GILES ET AL.

ERROR TO THE SUPREME COURT OF UTAH.

No. 193. Argued January 18, 1928.—Decided February 20, 1928.

1. Liability may constitutionally be imposed under a workmen's compensation law where there was a causal connection between the injury suffered by an employee and the employment in which he was engaged at the time, substantially contributing to the injury. P. 158.
2. If the employee be injured while passing, with the express or implied consent of the employer, to or from his work over the premises of another in such proximity and relation to the premises of the employer as to be in practical effect a part of them, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance. P. 158.
3. Award of compensation to a brickyard employee who was killed by a railroad train while crossing the right of way, off the public road, on his way to work—*held* consistent with the Fourteenth Amendment, in view of the facts stated in the opinion.

68 Utah 600, affirmed.

ERROR to a judgment of the Supreme Court of Utah, affirming an award of compensation made by the State Industrial Commission against the Brick Company for the death of one of its employees.

Mr. Henry D. Moyle for plaintiffs in error.

Injuries to employees, going to or returning from place of employment, or after leaving on personal errands, are not compensable. *Dambold* v. *Industrial Comm.*, 323 Ill. 377; *St. Louis Coal Co.* v. *Industrial Comm.*, 325 Ill. 574; *United Disposal Co.* v. *Industrial Comm.*, 291 Ill. 480; *Terminal Ass'n* v. *Industrial Comm.*, 309 Ill. 203; *Polko* v. *Taylor-McCoy Co.*, 289 Penn. 401; *Whitney* v. *Hazard Lead Works*, 105 Conn. 512; *Georgia Ry. Co.* v. *Clore*, 34 Ga. App. 409; *London Guaranty Co.* v. *Smith*, 290 S. W. 774; *Industrial Comm.* v. *Enyeart*, 81 Colo.

521; *Ditzler Poultry Co.* v. *Forsythe,* 86 Ind. App. 136, *McKenzie* v. *Industrial Comm.,* XXIV Oh. L. Rep. 480; *Simonds* v. *Reigel,* 165 Minn. 458; *Paulauskis' Case,* 135 Atl. 824; *Kinslow's Case,* 136 Atl. 724; *Reed* v. *Bliss Co.,* 225 Mich. 164; *Kent* v. *Virginia-Carolina Co.,* 143 Va. 62; *Devoe* v. *New York Ry.,* 218 N. Y. 318; *Norris* v. *N. Y. C. R. R. Co.,* 220 App. Div. (N. Y.) 359; *McMahon* v. *B. T. & J. J. Mack,* 222 N. Y. S. 79; *Leveroni* v. *Travelers' Ins. Co.,* 219 Mass. 488; *Bell's Case,* 238 Mass. 46; *Mazeffe* v. *Comm.,* 106 Kans. 796; *De Constantin* v. *Comm.,* 75 W. Va. 32; *Covey-Ballard Motor Co.* v. *Industrial Comm.,* 64 Utah 1; *North Point Irrigation Co.* v. *Industrial Comm.,* 61 Utah 421; *Harris* v. *Henry Cheney Corp.,* 221 App. Div. (N. Y.) 205; *Clapp's Parking Station* v. *Industrial Comm.,* 51 Cal. App. 624.

This case is to be considered as though the Utah statute had, in specific terms, provided for liability upon the precise facts constituting the case at bar. *Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418; *Ward* v. *Krinsky,* 259 U. S. 503.

Industrial Acts do not protect workmen while crossing railroad private rights of way, in going to and coming from their places of employment. *Dambold* v. *Industrial Comm.,* 323 Ill. 377; *Leveroni* v. *Travelers' Ins. Co.,* 219 Mass. 488; *Terminal Ass'n* v. *Industrial Comm.,* 309 Ill. 203; *St. Louis Coal Co.* v. *Industrial Comm.,* 325 Ill. 574; *Georgia Ry. Co.* v. *Clore,* 34 Ga. App. 409; *Bell's Case,* 238 Mass. 46.

The Utah Court has repeatedly held that injuries to employees on their way to and from their place of employment do not arise out of or in the course of their employment, and are therefore not compensable. *Covey-Ballard Co.* v. *Industrial Comm.,* 64 Utah 1; *North Point Irrigation Co.* v. *Industrial Comm.,* 61 Utah 421; *Cudahy Packing Co.* v. *Industrial Comm.,* 60 Utah 161.

Mr. Samuel B. Horovitz, with whom *Mr. Charles H. Houston* was on the brief, for defendants in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The question for determination is whether the Utah Workmen's Compensation Act (Comp. Laws, Utah, 1917, § 3133, and subsequent amendments), which provides compensation for personal injury or death of an employee by accident "arising out of or in the course of his employment," as it was construed and applied to the facts by the court below, contravenes the due process of law clause of the Fourteenth Amendment.

It is difficult to make a satisfactory statement of the facts from the evidence because of the absence from the record of a plat of the premises which was used before the state industrial commission and referred to by the witnesses, particular places, position of railway tracks, etc., being pointed out by references to the plat. But considering the testimony in connection with the findings of the industrial commission and of the court below, the following is a fair summary:

On June 17, 1925, Nephi Giles, an employee of the brick company, while crossing the tracks of the Bamberger Electric Railroad Company on his way to work, was struck by a train and killed. The yard of the brick company is on the west side of the railway tracks immediately adjacent thereto, and connected therewith, as the commission found, by a spur. The railroad tracks run north and south. Giles resided—and the evidence indicates that the employees generally resided—easterly from the railway tracks. In going from their homes to the brickyard, it was impossible to avoid crossing the railway tracks. There was a public crossing, called the Burns road, about 200 yards south of the brickyard. The right of way of

the railway company opposite the yard was fenced on both sides. Giles, as well as other employees, in going to work, sometimes followed the Burns road to the railway crossing, and then went north along the railway tracks to the northeast corner of the brickyard and thence through a gap in the fence to the north entrance of the yard; and sometimes employees, including Giles, entered the right of way through the east fence at other points north of the Burns road, and thence crossed the tracks more or less directly to the gap. This varied practice was well known to the company and carried on without objection on its part. It was possible to reach the brickyard by following the Burns road across the railway tracks and for a distance west, and thence northerly and easterly to the west entrance of the yard, but this way was long, circuitous and inconvenient, and, so far as the evidence shows, not used. A deep open ditch lying north of the road prevented access to the south end of the brickyard.

The manager of the company testified that he knew of the many ways by which the employees crossed the tracks; that he had seen Giles coming in all ways; that he cautioned Giles a number of times to be careful, but did not instruct him or any of the employees to discontinue these methods of crossing.

On the occasion of the accident which resulted in his death, Giles entered the Bamberger right of way through the wire fence on the east side at a point nearly opposite the gap in the west fence. He was struck while proceeding across the tracks to this point of exit.

From these facts the industrial commission found the company liable and made an award accordingly, which the court below affirmed. 68 Utah —.

Whether Giles was negligent in entering through the fence where he did, or in crossing the tracks, or in not

selecting the safest way, are matters not relevant to the inquiry. Liability was constitutionally imposed under the Utah compensation law if there was a causal connection between the injury and the employment in which Giles was then engaged substantially contributing to the injury. *Cudahy Co.* v. *Parramore,* 263 U. S. 418, 423–425. And employment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance. In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached. Probably, as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer. *Id.,* p. 426. And see generally, *Procaccino* v. *Horton & Sons,* 95 Conn. 408; *Merlino* v. *Connecticut Quarries Co.,* 93 Conn. 57; *Corvi* v. *Stiles & Reynolds Brick Co.,* 103 Conn. 449; *Starr Piano Co.* v. *Industrial Acc. Com.,* 181 Cal. 433, 436–438; *Sundine's Case,* 218 Mass. 1, 4.

In the *Parramore* case the same Utah statute was under consideration, and we held that it was valid as applied to the case of an employee who, while on his way to work,

was killed by a locomotive at a public crossing on a railroad adjacent to his employer's factory. There, as here, it was necessary for the employees, in order to get to the place of work, to cross the tracks, and they were in effect invited by the employer to do so. The difference between the two cases is that in the former the crossing customarily used was entirely upon a public road, while here the way followed was in part along the railway tracks and by crossings within the railroad right of way wherever the employees upon their own volition might choose to go.

The present case, though it comes nearer the border line, falls within the principle of the *Parramore* case. Since the only way of access to its brickyard from the east was across the railway tracks, the company necessarily contemplated the crossing of them by its employees. No definite line of travel being indicated by the company or followed by the employees, who, with the company's full knowledge and acquiescence, habitually crossed wherever they saw fit, it results that, however the crossing was made, the risk thereby incurred was reasonably incidental to the employment and became annexed as an implied term thereof. If it were necessary to strengthen the implication of consent on the part of the company to the crossing by any way its employees chose to take, it would be enough to refer to the testimony of the manager, who, knowing of the practice, did not forbid it, but in effect approved it by warning Giles simply to be careful.

It is said that Giles was a trespasser upon the railroad right of way; but if that be established by the evidence, the answer is that, if the company, not being the owner, could under any circumstances defend upon that ground (*Daltry* v. *Electric Light Co.*, 208 Pa. 403, 411–412), it cannot avail itself of the defense here because it consented to the trespass.

Judgment affirmed.

UNITED STATES *v.* MAGNOLIA PETROLEUM COMPANY.

CERTIORARI TO THE COURT OF CLAIMS.

No. 283. Argued January 4, 1928.—Decided February 20, 1928.

1. Section 1019 of the Revenue Act of 1924, which provides that interest on a refund of any internal revenue tax erroneously or illegally assessed or collected shall be allowed from the date when the tax was paid, cannot be construed retroactively as substituting that basis of interest recovery for the basis in the Act of 1921, as to refunds which had been allowed under the earlier Act but not computed or paid when the later Act was passed. P. 162.
2. This conclusion is not affected even if it be assumed that the interest allowed by the earlier Act was not within the saving clause accompanying the repeal of that Act by the later one, a question not here raised and therefore not considered. P. 163.
3. Save as given by Congress, there was no right to the interest. *Id.*
4. Under § 1324 (a), subdivision (1), Act of 1921, a claimant is not entitled to interest from the time when the tax was paid if the protest accompanying the payment gave no information and stated nothing that would aid in determining whether an overassessment had been made. P. 164.

63 Ct. Cls. 173, reversed.

CERTIORARI, 275 U. S. 512, to a judgment of the Court of Claims, allowing a claim for interest on refunds of income and excess profits taxes.

Assistant Attorney General Galloway, with whom *Solicitor General Mitchell* and *Mr. Sewall Key,* Attorney in the Department of Justice, were on the brief, for the United States.

Mr. Barry Mohun, with whom *Messrs. W. H. Francis* and *George E. Elliott* were on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent was assessed and paid for 1916 an income tax of $105,571.95 and for 1917, income and excess profits

taxes of $1,131,075.86 in excess of the amounts for which it was liable. October 11, 1923, the Commissioner of Internal Revenue so determined and, November 22, 1923, the respondent received certificates showing such overassessments and Treasury warrants for the return of these amounts. Each certificate included a statement that "interest status will be determined as soon as necessary data can be assembled."

Section 1324(a) of the Revenue Act of 1921, which was then in force, authorized interest from the date of the payment of the taxes if paid under protest; but, if not paid under protest or pursuant to an additional assessment, it allowed interest to commence six months after the filing of claim for refund. Section 1019 of the Revenue Act of 1924, provided that interest on refunds should be computed from the date the taxes were paid.[1]

January 18, 1924, the Commissioner notified respondent that the interest payable on the refunds had been determined. July 2, 1924, after the passage of the Revenue Act of that year, the Commissioner wrote respondent that

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[1] Section 1324 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 316: "That upon the allowance of a claim for the refund of . . internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund . . as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit . . ."

Section 1019 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 346 (U. S. C., Tit. 26, § 153): "Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, . . interest shall be allowed and paid on the amount of such credit or refund . . from the date such tax . . was paid to the date of the allowance of the refund . . ."

the amounts stated in his letter of January 18, 1924,—corrected by reason of an error as to the date of filing the claim for refund of 1917 taxes—would be paid, and on July 18, 1924, issued a Treasury warrant to respondent for $35,369.05, being $19,171.21 on the refund of 1916 taxes and $16,197.84 on the refund of 1917 taxes. Respondent, saving its right to sue for additional interest, accepted payment of the amount specified, and later brought this suit. The Court of Claims held that the Act of 1924 applied, calculated interest from dates of payment of the taxes, and gave judgment for $365,799.42. This Court granted a writ of certiorari. 275 U. S. 512.

The petitioner maintains that the interest should be computed according to § 1324(a) of the Act of 1921. Respondent contends that by § 1019 of the Act of 1924 and contemporaneous repeal of § 1324(a), the basis of interest allowances was changed and that, as the interest had not yet been paid, respondent became entitled to an amount calculated according to the later enactment. Undoubtedly it was within the power of Congress to apply that basis to claims like those of respondent. But the question is whether the statute should be so construed. The date of "allowance" was October 11, 1923, when the Commissioner approved the refunds. *Girard Trust Co.* v. *United States*, 270 U. S. 163, 169. Under § 1324(a), "upon the allowance" of the refunds, respondent became entitled to interest according to the rule then in force. Cf. *Blair* v. *Birkenstock*, 271 U. S. 348, 350. Computation and payment were all that remained to be done. There is nothing to suggest that § 1019 was intended to change the rule as to refunds theretofore allowed. The language employed shows the contrary. The words are "upon the allowance of . . a refund . . interest shall be allowed . . from the date such tax . . was paid." Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier pro-

visions unless the legislative purpose so to do plainly appears. *United States* v. *Heth*, 3 Cranch 399, 413; *White* v. *United States*, 191 U. S. 545, 552; *Shwab* v. *Doyle*, 258 U. S. 529, 534. Respondent calls attention to § 1100 of the Act of 1924 repealing the Act of 1921 and says that the saving clause therein does not extend to interest on refunds allowed under § 1324(a). But, save as given by Congress, respondent had no right to interest; as shown above, the basis prescribed by the later Act was not substituted for that fixed by the earlier one; and, as respondent's right to have the rule prescribed by the Act of 1921 applied is not questioned, we need not consider the effect of the repealing and saving clauses. It is clear that respondent is not entitled to allowances on the basis of the Act of 1924, and that the judgment must be reversed.

Respondent, assuming that the Act of 1921 applies, insists that the facts found by the lower court show that the Commissioner's allowances of interest were erroneous and that it is entitled to much more than it has received.

It appears from calculations made in its brief that if the basis contended for by the respondent be applied to the refund of the 1916 tax, respondent has been allowed and paid $864.99 in excess of what it was entitled to have. As petitioner is not complaining of that, we need not consider the matter.

As to the 1917 taxes, respondent filed returns May 18, 1918, but paid no tax thereon. May 27 following, it filed amended returns showing taxes of $1,966,600.87, and, on June 15, paid that amount under protest. Petitioner contends that the protest was not sufficient under § 1324(a) to support a claim for interest from the date of payment. On June 12, 1920, respondent filed a claim for the full amount paid; and, September 20, 1920, filed claim for $1,005,519.42. October 8, 1923, the Commissioner wrote respondent that its claim first filed would be allowed for $1,131,075.86 and that the one last filed would be rejected

in full. January 18, 1924, the Commissioner wrote respondent concerning the interest allowance stating that no part of the claim first filed had been allowed; that $105,556.84 had been allowed on the basis of the claim last filed and that $1,025,519.52 of the refund was "attributable to points not raised in the claim." The interest paid was calculated on the amount said to have been allowed on the latest claim for the period commencing March 20, 1921—six months after the filing of that claim—and ending October 11, 1923, the date of the allowance.

If the protest was sufficient under § 1324(a), interest should have been calculated on the amount of the refund from the date of the payment of the taxes. The lower court held it valid. In order to meet the condition specified in § 1324(a), the payment must be made "under a specific protest setting forth in detail the basis of and reasons for such protest." The findings set forth its language. The grounds asserted were that the taxing Acts were ambiguous, uncertain and unconstitutional; that they did not apply to respondent; that the regulations prescribed under them were not authorized, and that the method prescribed for applying the rates under the War Excess Profits Tax Act was arbitrary and unjust. It was not found that any part of the refund was allowed on any ground or for any reason specified in the protest. It requires no discussion to show that these general statements were not sufficient to constitute a basis for the allowance of interest from the date of the payment of the taxes. The protest gave no information and stated nothing that would aid in determining whether an overassessment had been made. It was not sufficient. *Girard Trust Co.* v. *United States, supra,* 172.

Assuming the protest inadequate, respondent insists that it is entitled to interest on the full amount of the refund from six months after the filing of its first claim. But, as the merits of that contention depend upon am-

biguous findings above referred to, the lower court should again consider the case and make definite determination of the controlling facts and give judgment thereon.

The judgment is reversed and the case is remanded for further proceedings in harmony with this opinion.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY *v.* ALLEN.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 160. Argued January 10, 11, 1928.—Decided February 20, 1928.

Plaintiff, while checking cars in a switching yard, was struck by a car shunted down the next track. While the space between the two tracks (in which he was standing) was sufficient to enable him to keep out of the way of moving cars, the danger attending his work would have been lessened if the space had been greater. The accident occurred at night. The cars moved at from four to six miles an hour; they were unlighted and unattended and no one warned plaintiff of their approach. He knew that switching was being done. There was nothing to show that the ordinary practice was departed from. He brought suit under the Federal Employers' Liability Act, alleging that his injuries had been caused by the failure to maintain an adequate space between tracks and by the failure to warn him of the approach of the car. *Held:*

1. The evidence is not sufficient to warrant a finding that defendant failed in any duty owed plaintiff in respect of the distance between tracks. Carriers, like other employers, have much freedom of choice in providing facilities and places for their employees, and courts will not prescribe the space to be maintained between tracks nor leave such questions to the uncertain and varying opinions of juries. P. 169.

2. In the absence of proof that plaintiff was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give warning by ringing the engine bell or otherwise. P. 170.

3. Except as specified in § 4 of the Federal Employers' Liability Act, the employee assumes the ordinary risks of his employment

and, when obvious or fully known and appreciated, the extraordinary risks and those due to negligence of his employer and fellow employees. On the evidence it is *held* that plaintiff assumed the risk. P. 171.

292 S. W. 730, reversed.

CERTIORARI, 273 U. S. 688, to a judgment of the Supreme Court of Missouri, affirming a recovery of damages for personal injuries, in an action under the Federal Employers' Liability Act.

Mr. Frank H. Sullivan, with whom *Messrs. Walter A. Eversman, James C. Jones* and *Lon O. Hocker* were on the brief, for petitioner.

Mr. Holland R. Polak, with whom *Mr. James J. O'Donohoe* was on the brief, for respondent.

The Federal Employers' Liability Act does not undertake to define negligence, except as to assumption of risk; aside from this, negligence is to be determined by the principles of common law. *Seaboard Air Line* v. *Horton,* 233 U. S. 492.

The opinion of the Missouri Court was based on the negligent failure to warn, a non-federal question, and a question of fact, and broad enough to maintain the judgment.

No privilege or immunity was specially set up or claimed under any statute. This Court is therefore without jurisdiction. *Capital Nat'l Bank* v. *First Nat'l Bank,* 172 U. S. 425.

The Missouri Court followed *Chesapeake & Ohio R. R.* v. *Proffitt,* 241 U. S. 462; *C. & O. R. R.* v. *DeAtley,* 241 U. S. 341, and distinguished, *Aerkfetz* v. *Humphreys,* 145 U. S. 418, which is inapplicable, as is also *Pryor* v. *Williams,* 254 U. S. 43.

Petitioner, by requesting an instruction on assumption of risk, is bound by the finding on that subject.

It is negligent to move cars in an unlighted yard, without bell or other warning, when such movement is likely

to subject employees working therein to danger. *Texas etc. Rwy.* v. *Gentry,* 163 U. S. 353; *Frazier* v. *Railroad Co.,* 264 Fed. 96; *Chesapeake & Ohio R. R.* v. *Proffitt,* 241 U. S. 462; *Norfolk & Western Rwy.* v. *Earnest,* 229 U. S. 114; *Davis* v. *Hynde,* 4 F. (2d) 656; *St. Louis etc. Rwy.* v. *Martin,* 266 U. S. 623.

Even if custom and rules permit, such movement under such circumstances is negligent. *Norfolk & Western Rwy.* v. *Earnest,* 229 U. S. 114; *Texas & Pacific Rwy.* v. *Behymer,* 189 U. S. 468; *C. R. I. & P. R. Co.* v. *Wright,* 239 U. S. 548; *Boos* v. *M. St. P. etc. R. R.,* 127 Minn. 381; *Chesapeake & Ohio Rwy.* v. *Proffitt,* 241 U. S. 462.

An employee does not assume an unusual risk occasioned by the master's negligence unless he becomes aware of and appreciates it.

Mr. Justice Butler delivered the opinion of the Court.

October 27, 1922, petitioner's railway system was being operated by a receiver as a common carrier of interstate commerce. Respondent was a car checker in the service of the receiver; and, while employed in such commerce in petitioner's railroad yard at Madison, Illinois, he was struck and injured by a shunted car. He brought this action in the Circuit Court of Saint Louis, Missouri, claiming damages under the Employers' Liability Act, U. S. C., Tit. 45, c. 2, § 51. The amended petition alleged that plaintiff's injuries were caused by the defendant's failure to maintain an adequate space between the tracks in the yard and by the negligent failure of other employees to warn him of the approach of the car. After the suit was commenced, the receiver was discharged and the railroad was returned to petitioner. The latter assumed the obligations of the receiver and was substituted for him as defendant. There was a verdict and judgment for plaintiff. The defendant, alleging numerous grounds, moved for a new trial. It was denied. The case was

taken to the Supreme Court where the judgment was affirmed. 292 S. W. 730. This Court granted a writ of certiorari. 273 U. S. 688.

The yard where plaintiff was injured included a lead track and, connected with it, a number of parallel switch tracks, the centers of which were about 12 feet apart. Plaintiff had been regularly employed there as car checker for about 18 months, and his hours were from eleven in the evening to seven in the morning. His work required him to be in the yard while switching was being done and to go from place to place to check and list cars that had been switched and arranged on various tracks for the purpose of making up trains. At the time of the accident, he was checking a string of cars that had been placed on track 5 and was between it and track 7, about 125 yards from the lead. A switching crew was at work in the yard. The engine was on the lead attached to from 20 to 25 cars that were between it and switch 4. Two cinder cars were detached from the end while the string of cars was being pushed by the engine. They were shunted by means of the switch to track 4 and by their own momentum moved to the place where plaintiff was struck. The yard was not artificially lighted. It was an ordinary starlight night without moon. The shunted cars moved at moderate speed—four to six miles per hour—and made noise enough to be heard at a distance of one or two car lengths. They were unlighted and unattended and no person warned plaintiff of their approach.

The Act of Congress under which plaintiff seeks recovery took possession of the field of liability of carriers by railway for injuries sustained by their employees while engaged in interstate commerce, and superseded state laws upon that subject. *Second Employers' Liability Cases*, 223 U. S. 1, 55. This case is governed by that Act and the principles of the common law as applied in the courts of the United States. The plaintiff cannot recover in the

absence of negligence on the part of defendant. *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 502. And, except as specified in § 4 of the Act, the employe assumes the ordinary risks of his employment and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees. *Boldt* v. *Pennsylvania R. R. Co.*, 245 U. S. 441, 445; *Ches. & Ohio Ry.* v. *Nixon*, 271 U. S. 218. If, upon an examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed. *C. M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 474.

The court authorized the jury to find defendant guilty of negligence if the space between the tracks was found to be so narrow that when track 5 was occupied plaintiff was in danger of being struck by cars moving on track 4. It was shown, as stated by the Supreme Court, that the clearance between the car that plaintiff was checking on track 5 and the moving cars on track 4 was about two feet and nine inches without considering the grab-irons on the cinder cars which projected four and one-half inches from each corner. While this space was sufficient to enable plaintiff to keep out of the way of the moving cars, the danger attending his work would have been lessened if the distance between the tracks had been greater. The work of checking cars in a yard at night where switching is being done is necessarily attended by much danger. But fault or negligence may not be inferred from the mere existence of danger or from the fact that plaintiff was struck and injured by the moving car. Defendant did not owe to plaintiff as high a degree of care as that due from carriers to their passengers or others coming on their premises for the transaction of business. The reason for the distinction is that plain-

tiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against the defendant. *Missouri Pacific Railroad Co.* v. *Aeby,* 275 U. S. 426. The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521, 529. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. *Tuttle* v. *Milwaukee Railway,* 122 U. S. 189, 194; *Randall* v. *Baltimore & Ohio R. R. Co.,* 109 U. S. 478, 482; *Washington, &c. Railroad Co.* v. *McDade,* 135 U. S. 554, 570. Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks. *Missouri Pacific Railroad Co.* v. *Aeby, supra.* The court erred in submitting that question to the jury.

And the court authorized the jury to find defendant negligent in failing to cause the engine bell to be rung and in sending the cars along track 4 without a light and unattended. The opinion below declares that the starting or running of the switch engine without ringing a bell or blowing a whistle was evidence of negligence; and that if, according to the practice, cars could be shunted dangerously near to the place where plaintiff was working, without any warning to him or "knowledge of such custom or practice on his part," the system of doing the work was

not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and did not assume the risk. Obviously the ringing of the bell when and after the cinder cars were uncoupled or when the engine started or while it was running would not have been useful as a warning to plaintiff. When the cars were detached, he was from three to four hundred feet from the lead track and the engine was at the other end of the string of cars. The decision on this point is contrary to the rule followed in the Federal courts. *Aerkfetz* v. *Humphreys,* 145 U. S. 418, was a case presenting a situation similar to that here involved. It is there said (p. 420): "The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion." And see *Rosney* v. *Erie R. Co.,* 135 Fed. 311, 315; *Connelley* v. *Pennsylvania R. Co.,* 201 Fed. 54, 57. And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. *Aerkfetz* v. *Humphreys, supra.*

In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him. *Boldt* v. *Pennsylvania R. R. Co., supra; Ches. & Ohio Ry.*

v. *Nixon, supra; Randall* v. *Baltimore & Ohio R. R. Co., supra; Tuttle* v. *Milwaukee Railway, supra.*

The amended petition alleged that the employees in charge of the engine and cars "saw, or by the exercise of ordinary care could have seen, plaintiff between said tracks, and in a position of peril and oblivious thereof in time thereafter, by the exercise of ordinary care, with the means and appliances at hand, to have either held said cars stationary, or after having started said cars, stopped them, or slackened the speed thereof in time . . to have avoided striking and injuring plaintiff; but that said . . employes failed and neglected so to do." Defendant requested the court to charge that plaintiff was not entitled to recover on that ground. The court refused and submitted the question to the jury.

Defendant contends that the evidence is not sufficient to warrant a determination of that issue in favor of the plaintiff. Immediately prior to the switching movement in question, the engine working on the lead was headed westerly attached to the easterly end of the string. The crew consisted of a foreman, two switchmen—one in the field and the other following the engine—the engineer and fireman. The plaintiff was then at the place of the accident. There is no claim that he was not about his work in the usual way or that he could not have avoided the cars if he had known they were coming. A slight movement on his part would have been enough. When the engine pushed the string westerly along the lead to give the cinder cars momentum, the field man was on the south side of the lead and turned switch 4 to shunt them to that track. There is no evidence that he saw plaintiff or knew where he was while the switching movement was being made. The foreman of the crew was on the north side near the westerly end of the string of cars. He lifted the coupling pin to detach the cinder cars and gave sig-

nals for the starting and stopping of the engine in order to give them the desired impulse. He saw the lantern carried by plaintiff on the north side of the cars on track 5 and assumed that plaintiff was at work there. Plaintiff's son was the other switchman. He was on the north side near the middle of the string of cars and received from the foreman and transmitted to the engineer the signals for the starting and stopping of the engine. He also saw plaintiff's lantern. Neither engineer nor fireman knew where plaintiff was. The mere fact that the foreman and plaintiff's son saw the lantern and knew that plaintiff was checking cars on track 5 is not sufficient. There is nothing to sustain a finding that plaintiff was in any danger other than such as was usually incident to his employment or that any member of the crew knew or had any reason to believe that he was oblivious of the situation. *Illinois Central Railroad Co.* v. *Ackerman,* 144 Fed. 959, 962. In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard or to warn or to take other steps to protect him. There is no evidence to sustain the allegation that the other employees saw, or negligently failed to discover, plaintiff in a "position of peril and oblivious thereof." There was no foundation for a finding in favor of the plaintiff on that issue. Cf. *Inland & Seaboard Coasting Co.* v. *Tolson,* 139 U. S. 551, 558–559; *Grand Trunk Railway Co.* v. *Ives,* 144 U. S. 408, 429; *Washington & Georgetown R'd* v. *Harmon,* 147 U. S. 571, 581–583; *Chunn* v. *City & Surburban Railway,* 207 U. S. 302, 309; *Denver City Tramway Co.* v. *Cobb,* 164 Fed. 41, 43; *Kansas City Southern Ry. Co.* v. *Ellzey,* 275 U. S. 236.

Judgment reversed.

MISSISSIPPI EX REL. ROBERTSON *v.* MILLER.

ERROR TO THE SUPREME COURT OF MISSISSIPPI.

No. 206. Argued January 20, 1928.—Decided February 20, 1928.

1. After services have been rendered by a public officer under a law specifying his compensation, there arises an implied contract under which he is entitled to have the amount so fixed. P. 179.
2. The protection of the Contract Clause of the Federal Constitution extends to such contracts. *Id.*
3. Relator, while a revenue agent in Mississippi, brought suits for recovery of past due taxes, and by the law then in force was thereupon entitled to a specified percentage of the taxes, payable upon their collection, and was authorized, upon his retirement, to prosecute the suits in the name of his successor. An Act passed after his retirement which authorized any suits brought by an outgoing agent to be conducted in the name of his successor upon petition of the latter showing to the court that he had investigated its merits and believed that it was just and should be maintained, and which provided that the commissions derived from such suits, when the successor had thus joined therein, should be shared equally between him and his predecessor, was construed retroactively by the state court as requiring that commissions due the relator from the suits brought by him should be so shared, albeit the successor had performed no services in the matters beyond receiving payment of the taxes from the taxpayers. *Held* violative of the relator's rights under the Contract Clause of the Constitution. P. 178.

144 Miss. 614, reversed.

ERROR to a judgment of the Supreme Court of Mississippi which affirmed a judgment giving the relator but one-half of the amount of certain commissions claimed as compensation for services rendered by him as a revenue agent in investigating and suing for past due taxes. This suit was against his successor in office, to whom the taxes had been paid.

Mr. Stokes V. Robertson, with whom *Mr. Thos. H. Johnston* was on the brief, for plaintiff in error.

Messrs. Marion W. Reily and *J. H. Sumrall* were on the brief for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The record presents for decision the question whether as applied in this case, c. 170, Laws 1924, amending § 7068 of Hemmingway's Annotated Code of Mississippi contravenes the clause of § 10 of Art. 1 of the Constitution which declares that no State shall pass any law impairing the obligation of contracts.

The suit was brought by the State in the Circuit Court of Hinds County for the use of Robertson, hereinafter called plaintiff, who in 1923 and prior years had been the state Revenue Agent. It is against his immediate successor in office, Miller, whom we shall call defendant, and the surety on his official bond. The purpose is to recover commissions on certain amounts collected by defendant on account of past due taxes for which plaintiff while in office had brought suits. Plaintiff claims under statutory provisions that were in force while he was in office, and defendant claims under the Act here in question, which was passed after the expiration of plaintiff's term. Section 7056 of the Code authorized the state Revenue Agent to appoint deputies and to sue for past due taxes. Section 7066 declared: "Neither the state, nor any county, municipality, or levee board shall be chargeable with any fees or expenses on account of any investigation or suit made or instituted by the state revenue agent; and he shall not receive any salary; but he shall be entitled to retain, as full compensation for his services and expenses, twenty per centum of all amounts collected and paid over by him . . . ". Section 7068 directed the successor to allow suits theretofore commenced to be conducted in his name and provided that "the person who commenced the suit shall pay all attorney's fees and expenses thereof, and receive the commissions if any."

Acting under these sections, plaintiff appointed deputies to assist in making collections and agreed to pay them one-half the commissions allowed by law. He employed

an attorney to bring suits and agreed to pay him one-fourth of such commissions. There remained a fourth for plaintiff, five per cent of the amounts collected. Certain suits which were brought by plaintiff to collect past due income taxes and privileges taxes, were pending when his term expired. He notified defendant of the agreements he had made with his deputies and attorney. Some amounts sued for remained unpaid until after the passage of c. 170 on February 29, 1924. That Act amends § 7068. Section 1 authorizes every suit brought by the outgoing agent and then pending to be conducted in the name of the successor upon the motion and petition of the latter directed to the court showing that he has investigated its merits and believes it is just and should be maintained; and the section declares that contracts of the former agent with his attorneys and employees shall be binding on the successor. Section 2 provides that " the expenses of all suits where the successor of the revenue agent has joined therein as above provided shall be paid by them equally and all fees and commissions legally derived therefrom shall be shared equally between them." After the passage of that Act, there was paid by various taxpayers to the defendant $9,784.07, on account of past due taxes claimed in suits brought by plaintiff. It does not appear that defendant took any step to have any of these suits carried on; but, claiming to be entitled to a part of them under c. 170, he refused to pay over the commissions for the use of plaintiff, his deputies and attorney. Then plaintiff brought this suit to recover five per cent. of the amount so collected by defendant, that being the portion of the commissions remaining for him after deducting the amounts which his deputies and attorney were entitled to have under their agreements with him. The Circuit Court gave plaintiff judgment for one-half the amount sued for. He appealed to the Supreme Court, and there contended that if applied in this case

c. 170 would impair the contract obligation of the State that he be paid for services rendered before its enactment, and would therefore violate the contract clause of the Federal Constitution. The court overruled his contention, applied the enactment retroactively, and affirmed the judgment. 144 Miss. 614.

If c. 170 had not been passed, plaintiff, his deputies and attorney would have been entitled to twenty per cent of the amounts collected by defendant. Under the statutes in force in 1923, the commissions were earned by the investigation to discover past due taxes and the institution of suits to coerce delinquent taxpayers, and such commissions became payable upon the collection of taxes sued for. In its opinion in this case, the Supreme Court said (p. 523): "It is the law, as contended by appellant, that, where the revenue agent brings a suit for taxes due the state or any of its political subdivisions, and afterwards the taxes are paid by the defendant taxpayer, the revenue agent is entitled to the commissions allowed him by the statute." Citing *Garrett* v. *Robertson,* 120 Miss. 731. *Robertson* v. *Shelton,* 127 Miss. 360. *Miller* v. *Henry,* 139 Miss. 651. *Miller* v. *Johnson,* 144 Miss. 201. And c. 170 did not operate to take from plaintiff's deputies and attorney any part of their shares of the commissions. *Miller* v. *Johnson* grew out of the suits and collections that form the basis of this case. Johnson [Johnston] was the attorney who brought plaintiff's suits against taxpayers. He sued Miller, defendant here, and was given judgment for his five per cent of the amounts collected. The Supreme Court decided that under c. 170 Miller was authorized to prosecute the suits brought by plaintiff; that the taxes sued for having been paid, it must be held that there was merit in the suits and that those employed by plaintiff were entitled to compensation under their contracts. Cf. *Miller* v. *Hay,* 143 Miss. 471.

The state court had to determine whether defendant was entitled to one-half the commissions remaining after deducting the shares of plaintiff's deputies and attorney. Plaintiff was authorized under § 7068, before amendment, to carry on in the name of his successor the suits he had commenced, and was required to pay all expenses. In the absence of c. 170, defendant would have had no authority in respect of the suits. That enactment authorized the Revenue Agent to look into the merits of pending suits brought by his predecessor and "submit to the courts in which the same were pending the question whether such suits should be prosecuted or not." [144 Miss. 626.] In the interval between the bringing of the suits by plaintiff and payments by taxpayers to defendant, the legislature conferred on his successor an authority not theretofore given; and, apparently deeming the contemplated services to be necessary and valuable, declared that expenses should be borne and commissions divided equally between the Revenue Agent who brought the suit and his successor. The Act did not empower defendant to do anything upon which plaintiff's right to the commissions depended. It authorized something not contemplated by the statute in effect when plaintiff brought the suits and became entitled to the commissions. As it does not appear that defendant took any step authorized by c. 170, presumably the collections resulted from the bringing of the suits without more. See *Johnson* v. *Miller, supra. Garrett* v. *Robertson, supra,* 743. As applied by the state courts, the new law operated to take part of the commissions earned by plaintiff and to hand it over to his successor on account of an unexerted authority to apply to the court to have the suits carried on—a step never before deemed necessary or contemplated in connection with collections of such taxes.

It is well understood that the contract clause does not limit the power of a State during the terms of its officers to pass and give effect to laws prescribing for the

future the duties to be performed by, or the salaries or other compensation to be paid to, them. *Butler* v. *Pennsylvania,* 10 How. 402. But after services have been rendered by a public officer under a law specifying his compensation, there arises an implied contract under which he is entitled to have the amount so fixed. And the constitutional protection extends to such contracts just as it does to those specifically expressed. The selection of plaintiff to be the Revenue Agent amounted to a request or direction by the State that he exert the authority and discharge all the duties of that office. In the performance of services so required of him plaintiff made the investigations and brought the suits to discover and collect the delinquent taxes. Under the statutes then in force as construed by the highest court of the State, he thereupon became entitled to the specified percentages of the amounts subsequently collected on account of the taxes sued for. The retroactive application of c. 170 would take from him a part of the amount that he had theretofore earned. That would impair the obligation of the implied contract under which he became entitled to the commissions. This case is ruled by *Fisk* v. *Jefferson Police Jury,* 116 U. S. 131.

Judgment reversed.

T. SMITH & SON, INC. *v.* TAYLOR.

ERROR TO THE COURT OF APPEAL FOR THE PARISH OF ORLEANS, LOUISIANA.

No. 186. Argued January 18, 1928.—Decided February 20, 1928.

While a longshoreman, employed in the unloading of a vessel at dock, was standing upon a stage that rested solely upon the wharf and projected a few feet over the water to or near the vessel, he was struck by a sling loaded with cargo, which was being lowered over her side, and was knocked into the water, where some time later he was found dead.

Held, that the right of action for his death was controlled by the state, and not by the maritime, law, since, though the death occurred in the water, the occurrence which was the sole, immediate and proximate cause of it and gave rise to the cause of action, was on the wharf, which was to be deemed an extension of the land. P. 181.

5 La. Ct. App. 284, affirmed.

ERROR to a judgment of the Court of Appeal of Louisiana affirming a recovery under the state workmen's compensation law. The Supreme Court of the State denied a writ of certiorari.

Mr. John May, with whom *Mr. Edmund L. Jones* was on the brief, for plaintiff in error.

Mr. Eugie V. Parham, with whom *Mr. Edward Rightor* was on the brief, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

March 12, 1925, plaintiff in error, a stevedoring corporation, was unloading a vessel lying in the Mississippi at a dock in New Orleans. George Taylor was in its employ as a longshoreman and came to his death while engaged in that work. Defendant in error is his widow and brought this suit in the Civil District Court of Orleans Parish under the Louisiana Workmen's Compensation Law* to recover compensation for herself and children. The district court gave judgment for them; the Court of Appeal affirmed; and its presiding judge, after the state Supreme Court had denied a writ of certiorari, allowed the writ of error that brings the case here.

Plaintiff in error maintained below and here insists that this is a case exclusively within the admiralty and mari-

* Act 20 of 1914 as amended by Act 243 of 1916, Act 38 of 1918, Acts 234, 244 and 247 of 1920, Act 43 of 1922 and Acts 21 and 216 of 1924.

time jurisdiction, and that, while the state Compensation Law is broad enough to apply to longshoremen unloading vessels, its application in this case violates § 2 of Art. 3 of the Constitution, which extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction" and also that clause of § 8 of Art. 1 which authorizes Congress to make laws for carrying into effect the powers granted by the Constitution.

At the time of the accident, cargo was being hoisted out of the hold to deck skids and thence swung to trucks operated upon a stage that rested solely upon the wharf and projected a few feet over the water to or near the side of the vessel. The petition of defendant in error alleged, and she introduced evidence to show, that deceased was standing on the stage when a sling, loaded with five sacks of soda weighing 200 pounds each, was being lowered over the side by means of a winch on the vessel; that the sling was swinging back and forth and, while deceased was trying to catch and steady it, the sling struck him and knocked him off the stage into the water where sometime later he was found dead. At the trial plaintiff in error maintained that deceased was not struck but accidentally fell into the river. The issues were decided in favor of defendant in error and the evidence is amply sufficient to sustain the finding.

Deceased was engaged in maritime work under a maritime contract. If the cause of action arose upon the river, the rights of the parties are controlled by maritime law, the case is within the admiralty and maritime jurisdiction, and the application of the Louisiana Compensation Law violated § 2 of Art. 3. But, if the cause of action arose upon the land, the state law is applicable. *The Plymouth*, 3 Wall. 20, 33; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Washington* v. *Dawson & Co.*, 264 U. S. 219. Plain-

tiff in error concedes that the stage and wharf on which deceased was working are to be deemed an extension of the land (*Cleveland Terminal R. R.* v. *Steamship Co.*, 208 U. S. 316, 321; *Industrial Comm.* v. *Nordenholt Co.*, 259 U. S. 263, 275) and that the state law would apply if he had been injured or killed by falling on the landing-place. It argues that as no claim was made for injuries sustained while deceased was on land and as the suit was solely for death that occurred in the river, the case is exclusively within the admiralty jurisdiction. But this is a partial view that cannot be sustained. The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death. The *G. R. Booth*, 171 U. S. 450, 460. The substance and consummation of the occurrence which gave rise to the cause of action took place on land. *The Plymouth, supra.* This case cannot be distinguished from *Johnson* v. *Chicago Elevator Co.*, 119 U. S. 388, 397 or *Martin* v. *West*, 222 U. S. 191, 196, The contention of plaintiff in error is without merit.

Judgment affirmed.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY *v.* TOWN OF MORRISTOWN ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 147. Argued January 6, 9, 1928.—Decided February 20, 1928.

The railroad company constructed a driveway over its station grounds to connect with the streets of the town. The railroad and the town agreed that the driveway should be kept open and that the town should exercise upon the station grounds, etc., all necessary police powers for the regulation of traffic and for the enforcement of the railroad's rules and regulations. The railroad granted a

cabman exclusive right to solicit passengers and baggage in the station grounds and to park his vehicles in the driveway. The town (claiming the right so to do under the contract) declared the space so assigned by the railroad a public hackstand and prohibited parking elsewhere. Other cabmen thereupon entered the grounds and used that space. The railroad objected on the ground that its property was being taken for municipal purposes without compensation. *Held:*

1. The taking of private property for public use is against the common right, and authority so to do must be clearly expressed. The agreement does not empower the town to establish a public hackstand on the company's land. P. 192.

2. Assuming that the creation of a public hackstand upon the station grounds would be a proper exertion of the police power, the due process clause safeguards to the owner of the land just compensation for the use of its property. P. 193.

3. As against those not using it for purposes of transportation, the railroad is private property in every legal sense, and if any part of its land is capable of use that does not interfere with discharge of its obligations as a carrier, the railroad has the right to use or permit others so to use it for any lawful purpose. P. 194.

4. A railroad is not bound to permit persons having no business with it to enter its trains, station or grounds to solicit trade or patronage for themselves, and the grant of such privilege to one does not give rise to any duty to others. P. 194.

5. To compel the use of railroad station grounds for public hackstands without compensation is to take them in violation of the due process clause of the Fourteenth Amendment. P. 195.

14 F. (2d) 257, reversed; District Court affirmed.

CERTIORARI, 273 U. S. 686, to a decree of the Circuit Court of Appeals which reversed a decree of permanent injunction, and directed dismissal of the bill in a suit by the railroad against the town and a number of taxicab men, to prevent the use of its land for the parking of vehicles and enjoin the enforcement of an ordinance designating part of it as a public hackstand.

Mr. John W. Davis, with whom *Mr. M. M. Stallman* was on the brief, for petitioner.

Sections 1, 2 and 3 of the ordinance are repugnant to the Fourteenth Amendment because they take petitioner's

property without due process of law. It is not necessary, in order to render the ordinance vulnerable to constitutional attack, that it must in terms or effect authorize an absolute conversion of property, so long as it affects the free use and enjoyment of the property or the power of disposition at the will of the owner. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Penna. Coal Co.* v. *Mahon*, 260 U. S. 393; *Great Northern Rwy.* v. *Minnesota*, 238 U. S. 340.

While the municipality has not in terms deprived petitioner of the title to its lands in establishing the hack stand thereon and in prohibiting the use of other parts of its property for parking space for private vehicles and taxicabs, it has deprived petitioner of the right to use the land according to its own plans, purposes and requirements. The property of a railroad company cannot be taken or appropriated, under the guise of regulation, except for a purpose within the statutory duties of the carrier. *Great Northern Rwy.* v. *Minnesota, supra; Great Northern Rwy.* v. *Cahill*, 253 U. S. 71.

Taxicab service is no part of the business of petitioner, and it cannot be compelled to furnish land for a public hack stand under the guise of an exercise of the police power. *Great Northern Rwy.* v. *Minnesota, supra; Id.* v. *Cahill, supra.*

As to the cab drivers, they have no right to make use of the company's premises, and such a right cannot be conferred upon them by a municipal ordinance. *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279; *Thompson's Express Co.* v. *Mount*, 91 N. J. Eq. 497. Cf. *Welsh* v. *Morristown*, 98 N. J. L. 630. *Munn* v. *Illinois*, 94 U. S. 113; *Union Dry Goods Co.* v. *Georgia Public Service Corp'n*, 248 U. S. 372; *Producers Transportation Co.* v. *R. R. Comm.*, 251 U. S. 228; and *Wolff* v. *Court of Industrial Relations*, 262 U. S. 522, distinguished.

As the railroad company is not required to furnish taxicab facilities, and no charge for such facilities is impliedly included in the rates of fare, and as no compensation is provided for the use of the land devoted to parking of taxicabs, the situation comes squarely within the opinion in *Banton* v. *Belt Line Rwy.*, 268 U. S. 413. See also, *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393.

The ordinance cannot be upheld as securing the performance of a legal duty owing by the railroad company to its passengers, i. e., as a regulation of transportation.

There is nothing in *Welsh* v. *Morristown*, 98 N. J. L. 630, that casts any doubt on the proposition that the town was without jurisdiction under the local law.

The contract of 1912 did not operate to grant to or confer upon the municipality the right to exclude the petitioner from the use of its own land and to establish thereon a public hackstand against its express objection.

Such regulation, however, is appropriate only over a public highway and any intent to dedicate the driveway here in question is negatived by the express terms of the contract. It is well settled under New Jersey law that in the face of an express disclaimer of an intent to dedicate, mere sufferance by an owner of general public user of his premises is insufficient to establish a dedication. *Wood* v. *Hurd*, 34 N. J. L. 87. See also, *Irwin* v. *Dixion*, 9 How. 10; *McKey* v. *Hyde Park*, 134 U. S. 84; *Folkestone Corp'n* v. *Brockman*, A. C. 338.

Mr. Conover English, with whom *Messrs. R. H. McCarter* and *N. C. Toms* were on the brief, for respondents.

The establishment of a parking place on the driveway in question was not contrary to the Fourteenth Amendment, but was justified under the police power by the public necessities for the safety, welfare and comfort of the public using the driveway and was authorized under

the express agreement of the railroad company set forth in the contract. This driveway is to all intents and purposes a public street leading to and alongside of a busy railroad station. The fact that only that part of the public having business with the railroad company and those of the public having occasion to go to and from Saw Mill Lane use this driveway, does not deprive it of its public character. *Van Dyke* v. *Geary*, 244 U. S. 39.

The property being devoted to a public use and so clothed with a public interest, is subject to reasonable regulation. *Munn* v. *Illinois*, 94 U. S. 113; *Chicago etc. R. R.* v. *Nebraska*, 170 U. S. 57; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Missouri Pacific Rwy.* v. *Omaha*, 235 U. S. 121; *Union Dry Goods Co.* v. *Georgia Public Service Corp'n*, 248 U. S. 372; *Producers Transportation Co.* v. *R. R. Comm.*, 251 U. S. 228; *Block* v. *Hirsh*, 256 U. S. 135; *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710.

The railroad by its contract consented to a taking for the purpose of regulating traffic when it opened its driveway to public traffic and permitted the town to exercise all necessary police power upon it to regulate that traffic. *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548; *Welsh* v. *Morristown*, 98 N. J. L. 630.

The general rule is that property may be regulated to a certain extent to protect the public health, safety, welfare, comfort or morals from dangers threatened. It is only when the regulation goes too far that it will be recognized as a taking. *Penna. Coal Co.* v. *Mahon*, 260 U. S. 393.

The town under its police power has power to regulate traffic by ordinance, including the establishment of cab stands. *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279. See also, *Swan* v. *Mayor of Baltimore*, 132 Md. 256; Dillon on Municipal Corporations, Vol. 3 (5th ed.), § 1167.

Nor does the contract between Welsh and the railroad company militate against the power of the town to pass

an ordinance to establish a cab stand as a regulation of traffic. *Thompson's Express Co.* v. *Mount,* 91 N. J. Eq. 497; *Donovan* v. *Pennsylvania Co., supra; Welsh* v. *Morristown,* 98 N. J. L. 630, distinguishing *Thompson's Express Co.* v. *Mount, supra.* See also, *Emerson* v. *Town of McNeil,* 84 Ark. 552; *St. Paul* v. *Smith,* 27 Minn. 364; *Lindsey* v. *Mayor of Anniston,* 104 Ala. 257; *Seattle* v. *Hurst,* 50 Wash. 424; *Williams* v. *Arkansas,* 217 U. S. 79; *Ex Parte Barmore,* 174 Cal. 286; *Ex Parte Maynard,* 98 Tex. Cr. Rep. 204.

The lands taken are devoted to a public use. The driveway constitutes the only street approach to the easterly side of the railroad station and is so clothed with a public interest that it is subject to reasonable regulation with respect to the traffic thereon.

The ordinance was passed pursuant to authority delegated to the town by the legislature of the State and as such it is a state law within the meaning of the Constitution. *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548; *Reinman* v. *Little Rock,* 237 U. S. 171.

The railroad has to a certain extent voluntarily enlarged its duties to include a taxicab service by the contract it made with Welsh. The railroad grants special privileges to Welsh in its station, building and grounds, and receives in return 10% of "the gross receipts from all business to and from said Morristown Station."

The town had the right to pass the ordinance of October 22, 1924, because of the express agreement of the railroad company set forth in the contract of 1912. The establishment of a parking place by the ordinance is within the terms of the contract in that it constitutes a regulation of foot and vehicular traffic at the station. See *Masterson* v. *Short,* 30 N. Y. 241; *The Taxicab Cases,* 143 N. Y. Supp. 279; *Waldorf-Astoria Hotel Co.* v. *New York,* 212 N. Y. 97.

The parties to the suit, namely, the railroad company and the town, by their conduct over a period of ten years practically have construed the contract to empower the town to establish a parking place on the driveway in question. *Van Dyke* v. *Anderson,* 83 N. J. Eq. 568; *Dennis* v. *Jones,* 44 N. J. Eq. 513; *Clampitt* v. *Doyle,* 73 N. J. Eq. 678; *Faulkner* v. *Wassmer,* 77 N. J. Eq. 537.

MR. JUSTICE BUTLER delivered the opinion of the Court.

October 30, 1924, petitioner brought this suit in the district court of New Jersey against the Town of Morristown and sixteen operators of taxicabs to restrain the town from enforcing an ordinance establishing a public hackstand in a driveway on petitioner's station grounds, to prevent the use of its land for parking of taxicabs and other vehicles and to restrain the individual defendants from going on its premises to solicit patronage and from using its grounds as a hackstand.

The Morris and Essex Railroad Company owns the railroad and petitioner operates it as lessee in perpetuity. September 24, 1912, an agreement was made between the town and the companies providing for the elevation of the tracks in order to eliminate certain grade crossings. The agreement was fully performed. The tracks run north and south through station grounds of somewhat irregular shape containing about four acres. The main station building is on the west side of the tracks and on the east side there is a platform roofed over, called the shelter house. The town agreed to lay out and construct a new street extending to the station grounds on the east side of the tracks. The companies agreed to "dedicate any lands owned by them necessary for the laying out of such new street." Petitioner constructed and maintains driveways within its grounds, one of which passes under the tracks along the north boundary and thence south parallel to the tracks and near the east side of the shelter

house to the south boundary of the grounds where it connects with the new street. It was agreed that: "Said driveway shall be kept open at all times for passengers, pedestrians . . . and . . . vehicular traffic to and from the station grounds on the easterly side of said Railroad and for the use of those now having rights of egress to Morris Street in Saw Mill Lane, but this contract shall not be construed as a dedication of said driveway as a public highway." It was further agreed "that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

Passengers arriving on trains from New York get off on the east side and leave the station grounds by the driveway described. Prior to 1922, operators of taxicabs were accustomed to drive into the grounds to meet these trains and there solicit patronage. It is a matter of common knowledge that such competition for the transportation of passengers and their baggage from railway stations is liable, if not indeed certain, to be attended by crowding together of cabmen, confusion, noisy solicitations, importunities and contentions resulting to the annoyance and disadvantage of those sought to be served.* And the record shows that these or similar abuses prevailed or were liable to occur at the Morristown station. December

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* *Donovan* v. *Pennsylvania Company,* 199 U. S. 279, 295; *Commonwealth* v. *Power,* 7 Metc. 596; *Napman* v. *The People,* 19 Mich. 352, 356; *Dingman* v. *Duluth,* etc. R. Co., 164 Mich. 328, 330–331; *Hedding* v. *Gallagher,* 72 N. H. 377, 395; *Thompson's Co.* v. *Whitemore,* 88 N. J. E. 535, 536; *Railroad* v. *Kohler,* 107 Kan. 673, 677; *Brown* v. *Railroad Co.,* 75 Hun. 355, 362; *Rose* v. *Public Service Commission,* 75 W. Va. 1, 6; *New York, N. H. & H. R. Co.* v. *Scovill,* 71 Conn. 136, 137, 148; *Landrigan* v. *State,* 31 Ark. 50; *Union Depot & Ry. Co.* v. *Meeking,* 42 Colo., 89, 97.

28, 1922, petitioner made an agreement with one Welsh in which it was stated that petitioner desired to establish adequate cab service for the accommodation of its passengers and to regulate the solicitation of business in its station and upon its station grounds and the parking of vehicles there. It granted to him the privilege, under the control of petitioner's manager, to solicit business as a cabman in the station and on its grounds, to have a stand and telephone facilities in the station and to park his vehicles upon a specified space in the driveway east of the shelter house. Welsh agreed to have a sufficient number of vehicles, to maintain them at the highest standard of efficiency and to give satisfactory service at specified rates which should "in no wise exceed the rates now or hereafter prescribed by municipal ordinance." Then, on February 7, 1923, the municipal authorities, conceiving that this agreement created a monopoly and was unjust to other taxicabmen, adopted an ordinance prohibiting the standing of automobiles upon the space set aside for Welsh for "a longer time than is necessary to take on and let off passengers, expressage or baggage", and prohibiting such standing of vehicles on any other part of the driveway. In a suit brought by Welsh against the town the State Supreme Court held this ordinance to be a valid regulation of traffic under general power of the town and under the track elevation agreement. 98 N. J. L. 630, affirmed by the Court of Errors and Appeals *sub nomine Welsh* v. *Potts*, 99 N. J. L. 528. Upon the termination of that litigation, the town, October 22, 1924, passed the ordinance here in question. It declares a space including that set aside by the petitioner for the use of Welsh's vehicles to be "an additional public hackstand" and prohibits the parking of vehicles in other parts of the driveway. Immediately upon the passage of this ordinance, the individual defendants entered the station grounds, parked their vehicles upon the space so designated and solicited patronage.

The petitioner brought this suit claiming that the enforcement of the ordinance would take its property for municipal purposes without due process of law in contravention of the Fourteenth Amendment. In defense the respondents maintain that the establishment of the public hack stand does not amount to a taking of petitioner's property but is a mere traffic regulation that the town is authorized to make under the track elevation agreement and also by the exertion of its police power.

After trial, the district court entered its final decree declaring the ordinance repugnant to the Fourteenth Amendment and restraining the town from taking the company's land for a public hack stand and preventing it from interfering with the company's use of its premises or control of vehicles thereon and commanding the individual defendants to refrain from parking vehicles or soliciting patronage on the station grounds. The Circuit Court of Appeals reversed the decree and directed the district court to dismiss the case. 14 F. (2d) 257. This Court granted a writ of certiorari. 273 U. S. 686.

The Circuit Court of Appeals held that the track elevation agreement authorized the town to establish a public hack stand on the driveway in the station grounds. The principal purposes of that agreement was to eliminate grade crossings; regulation of traffic to and from the station was incidental. The town has not acquired by purchase or eminent domain any part of petitioner's land or the right to establish a public hack stand there. It is not claimed that the agreement expressly authorizes the town to make such an appropriation of petitioner's land. And there is nothing from which such a grant may be implied. The intention of the parties is plainly expressed. There is an express dedication by the companies of their lands within the new street opened by the town outside the station grounds. But, there being no such purpose in respect of land within the grounds, the agreement declares

"this contract shall not be construed as a dedication of said driveway as a public highway." There is no room for construction. And, even in the absence of that clause, the facts disclosed by the record are not sufficient to raise a presumption of dedication. *Wood* v. *Hurd*, 34 N. J. L. 87.

While petitioner owed its passengers the duty of providing a suitable way for them to reach and leave its station, it was not bound to allow cabmen or others to enter upon or use any part of its buildings or grounds to wait for fares or to solicit patronage. *Donovan* v. *Pennsylvania Company*, 199 U. S. 279, 295. *Thompson's Express Co.* v. *Mount*, 91 N. J. Eq. 497. Its agreement to keep the driveway "open for traffice to and from the station" did not add to its obligations or enlarge the powers of the town. Respondents put much reliance upon the clause providing that the town "may and shall exercise all necessary police powers" in and upon the station grounds "for the purpose of regulating traffic" at the station and for the enforcement of petitioner's rules and regulations in respect thereto. But it is to be borne in mind that the taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed. *Western Union Tel. Co.* v. *Penn. R. R.*, 195 U. S. 540, 569. Lewis on Eminent Domain (3rd ed.), § 371. *Inhabitants of Springfield* v. *Connecticut River Railroad Co.*, 4 Cush. 63, 69–72. *Holyoke Company* v. *Lyman*, 15 Wall. 500, 507. Cf. *Richmond* v. *Southern Bell Telephone Co.*, 174 U. S. 761, 777. The provision relied on is merely petitioner's authorization and the town's agreement that the municipal power of police shall be exerted for the purpose of regulating, and to carry into effect petitioner's rules in respect of, the traffic at the station. The agreement does not empower the town so to appropriate petitioner's land.

Is the provision of the ordinance of October 22, 1924, declaring a part of the driveway to be a public hack stand a valid exercise of the police power? We assume that by the laws of the State the town is authorized to regulate traffic and to establish public hack stands in its streets and other public places. It does not claim the power to take or appropriate private property for such a purpose without giving the owner just compensation, but it contends that the establishing of this hack stand "was justified under the police power by the public necessities for the safety, welfare and comfort of the public using the driveway" and that it does not take private property for public use without compensation "because the lands taken are devoted to a public use." But, assuming that under the circumstances the creation of the public hack stand would be a proper exertion of the police power, it does not follow that the due process clause of the Fourteenth Amendment would not safeguard to the owner just compensation for the use of its property. *Penna. Coal Co.* v. *Mahon,* 260 U. S. 393, 416. The police power may be and frequently it is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him. The railroad grounds, station, platforms, driveways, etc., are used by the petitioner for the purposes of its business as a common carrier; and, while that business is subject to regulation in the public interest, the property used belongs to petitioner. The State may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the Fourteenth Amendment. *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362, 396, *et seq. Smyth* v. *Ames,* 169 U. S. 466, 523, 526. *Western Union Tel. Co.* v. *Penna. R. R., supra,* 571. *Producers*

Transportation Co. v. *Railroad Commission,* 251 U. S. 228. *Michigan Commission* v. *Duke,* 266 U. S. 570, 577–578.

As against those not using it for the purpose of transportation, petitioner's railroad is private property in every legal sense. The driveway in question is owned and held by petitioner in the same right and stands on the same footing as its other facilities. Its primary purpose is to provide means of ingress and egress for patrons and others having business with the petitioner. But, if any part of the land in the driveway is capable of other use that does not interfere with the discharge of its obligations as a carrier, petitioner as an incident of its ownership and in order to make profit for itself has a right to use or permit others to use such land for any lawful purpose. *Donovan* v. *Pennsylvania Company, supra,* 294.

There was no duty upon petitioner to accord to other taxicabmen the use of its lands simply because it had granted Welsh the privileges specified in its contract with him. Petitioner is not bound to permit persons having no business with it to enter its trains, stations or grounds to solicit trade or patronage for themselves; they have no right to use its property to carry on their own business. Petitioner had no contract relations with taxicabmen other than Welsh and owed them no duty because they did not have any business with it. The enforcement of the ordinance here assailed would operate to deprive petitioner of the use of the land in question and hand it over to be used as a public hack stand by the individual defendants and others. As to them, and so far as concerns its use as a public hack stand, the driveway was petitioner's private property and could not be so appropriated in whole or in part except upon the payment of compensation.

Under the guise of regulation, the town cannot require any part of the driveway to be used in a service that peti-

tioner is under no duty to furnish. And, as petitioner's duty here involved is confined to the business of carrying passengers by railroad, the declaration of the ordinance that the specified part of the driveway "is hereby designated and established as an additional public hack stand" clearly transcends the power of regulation. To compel the use of petitioner's land for that purpose is to take it without compensation in contravention of the constitutional safeguard here invoked. *Great Northern Ry. Co.* v. *Minnesota,* 238 U. S. 340, 346. *Great Northern Ry. Co.* v. *Cahill,* 253 U. S. 71.

The decree of the Circuit Court of Appeals is reversed, and the decree of the district court is affirmed.

MR. JUSTICE BRANDEIS, concurring in part.

I agree that the decree of the Circuit Court of Appeals, directing a dismissal of the Railroad's bill, should be reversed. But I think that the decree of the District Court requires serious modification. That decree ordered among other things, "that the Town of Morristown, do desist and refrain, and is hereby forever restrained and enjoined by the attempted enforcement of said ordinance or otherwise, from in any manner interfering with or hindering or obstructing the complainant, the Delaware, Lackawanna & Western Railroad Company, in the occupation, use or control of its said station grounds, or in regulating the place, manner or time in which public or private vehicles going to and from said station grounds shall enter, stand or wait thereon or depart from the same." This part of the decree is, in my opinion, inconsistent with the terms of the contract between the Railroad and the town, with the decision of the highest court of the State construing the same, *Welsh* v. *Morristown,* 98 N. J. L. 630, affirmed *sub*

nom. Welsh v. *Potts*, 99 N. J. L. 528, and with the general law of New Jersey. It seems to me inconsistent, also, with the law concerning the obligations of railroads as heretofore declared by this Court.

The situation which confronted the town authorities was this: About 3,000 passengers are handled in and out of the station each day. Continuously, for nearly ten years after the elimination of the grade crossings, cabs had, under the direction of the town authorities and with the acquiescence of the Railroad, parked at the place later assigned by the ordinance here in question. Then, in 1922, arose the controversy which gave rise to the *Welsh* case and to the case at bar. The bulk of the traffic passing through the station is composed of persons commuting to Newark and New York. Accordingly, the demand for taxicabs at the station is largely concentrated in the late afternoon hours. There are forty-two licensed cabs in Morristown. About twenty-five of them were accustomed to park at the station, at various times of the day. Presumably most of them were available for service at the rush hour in the late afternoon. Welsh, for whom the Railroad asserts the exclusive privilege of using the driveway as a hack stand, has only three licensed cabs. Obviously, these are insufficient to give an adequate service. It is true that Welsh made application for additional licenses, and that these have been denied by the town authorities. But the testimony shows that the authorities were of the opinion that there were already more taxicabs in the town than could be operated profitably. No new license had been granted to any one since a date preceding Welsh's application; and no cabman had a license to operate more than three cabs.

The Railroad presented this alternative to the town: "Either grant to Welsh licenses sufficient in number to enable him to supply the needs of all passengers arriving at the station, or submit to a denial to such passengers of

the facilities customary on leaving the station." To escape from that dilemma the town first resorted to the means upheld by the New Jersey courts in the *Welsh* case. It prohibited all parking on the driveway, and located a public taxi-stand on a public street adjacent thereto. While this provided a service adequate so far as the number of vehicles was concerned, it proved unsatisfactory in other respects. The taxi-stand was several hundred feet distant from the shelter house; was not easily visible therefrom; and was difficult of access in inclement weather. The town then passed the ordinance which gave rise to the present suit. It undertook to establish near the station door a public taxi-stand on the Railroad's land. That it clearly had no right to do; for the contract between it and the Railroad had not made the driveway a public street. Obviously a railroad's property cannot be taken without compensation for a purpose unconnected with its rail transportation. *Great Northern Ry. Co.* v. *Minnesota,* 238 U. S. 340, 346; *Great Northern Ry. Co.* v. *Cahill,* 253 U. S. 71. A public taxi-stand is such an unconnected purpose. It would be open to use by cabs which do not serve the patrons of the Railroad, as well as those which do. In establishing this public taxi-stand, the town exceeded its powers. Enforcement of this ordinance was properly enjoined. And since the individual defendants must base their claims on the ordinance, the injunction against them also was proper. Compare *Donovan* v. *Pennsylvania Co.,* 199 U. S. 279; *Thompson's Express & Storage Co.* v. *Mount,* 91 N. J. Eq. 497.

But the injunction granted by the District Court was so broad as to prevent the town from making, by future ordinance, provisions which it may deem necessary to assure to its inhabitants adequate cab facilities. While the contract between the town and the Railroad did not make the driveway a public highway, it did not restrict

rights which the town would otherwise have had under the New Jersey Law and under decisions of this Court. Under the New Jersey law the Railroad was bound to keep the driveway open to all persons seeking access to and from the station on legitimate business. It could not obstruct the driveway by physical enclosure. *Public Service Ry. Co.* v. *Weehawken,* 94 N. J. Eq. 88, 92. It could not, by its private contract with Welsh, interfere with the power of the municipality to make appropriate regulations as to traffic there. *Welsh* v. *Morristown, supra.* For as the New Jersey court said, "the driveway in question was and is devoted to public use, although the fee thereof remained in the railroad company." Like all property of a carrier by railroad, the driveway was subject to the power of the State to compel the provision of adequate facilities incident to the rail transportation.

In these days, the ability of the traveller to obtain conveniently, upon reaching the street door of the station, a taxicab to convey him and his hand-baggage to his ultimate destination, is an essential of adequate rail transportation. The duties of a rail carrier are not necessarily limited to transporting freight and passengers to and from its stations. It must, in connection with its stations, provide adequately for ingress and for egress. And if it does not itself provide the facilities essential for the convenient removal of freight and passengers from the station, it may be required to let others provide them. That a railroad's obligations may be extended beyond its rails, is settled by numerous decisions of this Court. *Atlantic Coast Line R. R. Co.* v. *Corporation Commission,* 206 U. S. 1, 21–22; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa,* 233 U. S. 334; *Michigan Central R. R. Co.* v. *Railroad Commission,* 236 U. S. 615; *Chicago & Northwestern Ry. Co.* v. *Ochs,* 249 U. S. 416; *Lake Erie & Western R. R. Co.* v. *Public Utilities Commission,* 249

U. S. 422. A State may require a railroad to construct stations. *Minneapolis & St. Louis R. R. Co.* v. *Minnesota,* 193 U. S. 53. It may compel the building of a crossing for the convenience of shippers in removing freight. *Norfolk & Western Ry. Co.* v. *Public Service Commission,* 265 U. S. 70, 74. Its power to require adequate provision for carrying passengers to their ultimate destination rests on the same basis. Compare *Pennsylvania R. R. Co.* v. *Knight,* 192 U. S. 21, 26.

The Lackawanna Railroad recognized the importance of proper cab service. It undertook to provide it by the contract with Welsh. But Welsh was in no position to furnish adequate service. He had only three licensed cabs. The Railroad answers that Welsh agreed by his contract with it to supply as many cabs as were needed and that, but for the refusal of the town to grant him more licenses, he would have supplied the requisite number. The town was not obliged to issue additional licenses to Welsh. Its refusal to do so was not arbitrary or unreasonable. The ground of its refusal was that the granting of additional licenses would ruin the business of the established cabmen who had long been engaged in serving its inhabitants, and thus would impair the cab service of the general public throughout the town. The principle on which the town acted is one that is general in motor vehicle regulation today.[1] It is one that has been ap-

[1] In at least nine states the commission charged with the duty of licensing bus operators is specifically directed to consider the transportation service already furnished and the effect which the proposed service would have upon it, Colorado, Compiled Laws, 1921, § 2946; Kansas, Laws, 1925, c. 206, § 4; Kentucky, Acts, 1926, c. 112, § 4; Montana, Laws, 1923, c. 154, § 4; North Dakota, Laws, 1925, c. 91, §§ 4, 5, 8; Ohio, Page's Code, 1926, § 614–87; South Dakota, Laws, 1925, c. 224, § 3; West Virginia, Barnes' Code, 1925, c. 43, § 82; Wyoming, Compiled Statutes, 1920, § 5497. The principle of safeguarding established, adequate facilities, is applied by commissions in

proved by this Court. *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 277; *Interstate Busses Corp.* v. *Holyoke Street Ry. Co.*, 273 U. S. 45, 52. Compare *Packard* v. *Banton*, 264 U. S. 140, 145; *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583, 599–600.

The record shows that the service which Welsh can furnish is inadequate, that to grant him sufficient licenses to enable him to furnish such service would impair taxi service throughout the town, and that a taxi-stand located elsewhere than on the driveway does not satisfy the needs of travellers leaving the station. If, under these circumstances, the town should pass an ordinance establishing,

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passing upon applications for certificates of convenience and necessity, and by courts in reviewing their orders, although there is not a specific direction in the statute. In the following cases the orders of commissions granting certificates of convenience and necessity were set aside on the ground that it did not sufficiently appear that existing facilities were inadequate: *West Suburban Transportation Co.* v. *Chicago & West Towns Ry. Co.*, 309 Ill. 87; *Choate* v. *Commerce Commission*, 309 Ill. 248; *Superior Motor Bus Co.* v. *Community Motor Bus Co.*, 320 Ill. 175; *Cooper* v. *McWilliams & Robinson*, 298 S. W. 961 (Ky.); *Cincinnati Traction Co.* v. *Public Utilities Commission*, 112 Ohio St. 699; *East End Traction Co.* v. *Public Utilities Commission*, 115 Ohio St. 119; *Columbus Ry., Power & Light Co.* v. *Public Utilities Commission*, 116 Ohio St. 36; *Chicago, Rock Island & Pacific Ry. Co.* v. *State*, 123 Okla. 190. In *Red Star Transportation Co.* v. *Red Dot Coach Lines*, 220 Ky. 424; *McClain* v. *Public Utilities Commission*, 110 Ohio St. 1; and *Abbott* v. *Public Utilities Commission*, 136 Atl. 490 (R. I.), orders denying certificates were sustained, on the ground that the proposed operation would have impaired adequate transportation facilities already established. The same principles apply with regard to municipal regulation of jitney busses. *Cloe* v. *State*, 209 Ala. 544, 545–546; *Birmingham Interurban Taxicab Service Corp.* v. *McLendon*, 210 Ala. 525; *State* v. *City of Spokane*, 109 Wash. 360. That a railroad has no preferred claim to the grant of a certificate, see *Northern Pacific Ry. Co.* v. *Department of Public Works*, 256 Pac. 333 (Wash.). Compare *Baltimore & Ohio R. R. Co.* v. *State Road Commission*, 139 S. E. 744 (W. Va.).

on the driveway, a taxi-stand available only to incoming passengers, I see no reason why, under the contract between it and the Railroad or under the general laws of New Jersey, it may not do so. Certainly *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, presents no obstacle. For in that case, the Court expressly left open the question whether the State, to secure adequate service, might require what the cabmen there asserted of their own right. P. 298. Compare *Norfolk & Western Ry. Co.* v. *Public Service Commission, supra.*

Moreover, the decree is subject to another infirmity. By its broad language, it restrains the town from making and enforcing reasonable traffic regulations applicable to the driveway. In so doing it conflicts with both the terms of the contract and the decision of the New Jersey courts in the *Welsh* case. The contract between the Railroad and the town expressly declares that the driveway "shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds"; and that "the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic." It was decided in *Welsh* v. *Morristown*, 98 N. J. L. 630, affirmed sub nom. *Welsh* v. *Potts*, 99 N. J. L. 528, that under this contract the town had power to prohibit all parking on the driveway. That construction, being a ruling on a matter of law, is binding upon us. *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 358; *Guffey* v. *Smith*, 237 U. S. 101, 112–113. Compare *Detroit* v. *Osborne*, 135 U. S. 492, 497–500; *Hartford Insurance Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 175 U. S. 91, 100.

MR. JUSTICE HOLMES concurs in this opinion.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION *v.* ROSENBERG BROTHERS & COMPANY.

SAME *v.* CALIFORNIA WINE ASSOCIATION.

SAME *v.* S. L. JONES & COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 119, 120, 121. Argued December 6, 1927.—Decided February 20, 1928.

1. The Suits in Admiralty Act was intended to furnish the exclusive remedy in admiralty against the United States and corporations, such as the Fleet Corporation, of which the United States or its representatives own the entire outstanding capital stock, on all maritime causes of action arising (since April 6, 1917) out of the possession or operation of merchant vessels. And nothing in its legislative history indicates a different purpose. P. 212.
2. As the libels in these cases were not brought against the Fleet Corporation within the period prescribed by § 5, they were barred. P. 214.
3. The statute of limitations having been sufficiently pleaded in exceptions to the libels, it was not necessary to plead it in the answers. P. 214.
4. Whether, in addition to furnishing an exclusive remedy in admiralty, the Act also prevents resort to any concurrent remedies against the United States or the corporation on like causes of action in the Court of Claims or in courts of law, is a question not presented by these cases and upon which no opinion is expressed. P. 214.

12 F. (2d) 721, reversed.

CERTIORARI, 273 U. S. 682, 683, to decrees in admiralty rendered by the Circuit Court of Appeals, reversing decrees of the District Court, 295 Fed. 372; 7 F. (2d) 893, in three consolidated cases in admiralty by libels *in personam*, brought against the Fleet Corporation by the present respondents to recover the value of goods shipped

by them on a vessel owned by the United States and operated by the Corporation, which was wrecked and lost after an alleged deviation from the agreed voyage.

Mr. Chauncey G. Parker, General Counsel, U. S. Shipping Board, for petitioner. On the brief were also the *Solicitor General* and *Messrs. George R. Farnum,* Assistant Attorney General, *Arthur M. Boal,* Admiralty Counsel, *F. R. Conway,* Assistant Admiralty Counsel, of the Shipping Board, *Clinton M. Hester,* and *John T. Fowler, Jr.*

Since the *West Aleta* was owned by the United States; was acquired by authority of the Act of June 15, 1917 (c. 29, 40 Stat. 182), and was managed and operated by the Fleet Corporation by direction of the President pursuant to the same Act, when the claims in question arose, the United States was liable for these claims.

The same remedies are given against the Fleet Corporation as against the United States. The provisions of the Suits in Admiralty Act are exclusive, and bar all actions such as these which were not commenced within the period therein described.

On the status of the Fleet Corporation as an agency of the United States, see *The Lake Monroe,* 250 U. S. 246. Cf. *U. S. Grain Corp.* v. *Phillips,* 261 U. S. 106; *United States* v. *Walter,* 263 U. S. 15; *King County* v. *Fleet Corporation,* 282 Fed. 950; *United States* v. *Coghlan,* 261 Fed. 425; *Clallam County* v. *U. S. Spruce Corp.,* 263 U. S. 341.

The remedy provided by the Suits in Admiralty Act is available in all cases *ex delicto* as well as *ex contractu;* in all cases *in personam* as well as *in rem, Eastern Transportation Co.* v. *United States,* 272 U. S. 675; whether such operation is in the government's "sovereign capacity as a war measure," as in the case of the *West Aleta,* or "for the purpose of advancing the trade of its people,"

The Pesaro, 271 U. S. 562, "for the proper growth of its foreign and domestic commerce," Merchant Marine Act, 1920, c. 250 § 1, 41 Stat. 988. In either case, the vessels "are public ships in the same sense that warships are." *The Pesaro, supra.*

The provision for payment of decrees against the corporation with public money, stamps as public every activity that may form the basis of any such decree. *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123; *Van Brocklin* v. *Tennessee,* 117 U. S. 151; *United States* v. *Insley,* 130 U. S. 263.

No other system is provided. Since the only possible recourse is on the public treasury, it is essential in order that the officers of the Treasury may be seasonably advised as to the demands on the Treasury, that the system be exclusive, and that a uniform period of limitation be applied. *Nichols* v. *United States,* 7 Wall. 122; *Arnson* v. *Murphy,* 109 U. S. 238; *Nassau Smelting Works* v. *United States,* 266 U. S. 101; *United States* v. *Pfitsch,* 256 U. S. 547; *Smith* v. *Reeves,* 178 U. S. 436; *United States* v. *Forbes,* 278 Fed. 331.

Since § 13 of that Act expressly repealed "the provisions of all other Acts inconsistent herewith," seemingly it alone may be looked to to supply the remedy and to confer the jurisdiction. *U. S. ex rel. Skinner & Eddy* v. *McCarl,* 275 U. S. 1.

It is significant that the same Congress passed both the Suits in Admiralty Act and the Merchant Marine Act of 1920.

In any event, the actions were barred by laches.

The *West Aleta* did not deviate in sailing directly for Hamburg as her first port of call.

Mr. J. M. Mannon, Jr., with whom *Messrs. Farnham P. Griffiths, Edwin S. Pillsbury, Edward J. McCutchen,* and *Warren Olney, Jr.,* were on the brief, for respondents.

Prior to the passage of the Suits in Admiralty Act, the Fleet Corporation was subject to the same obligations, responsibilities and remedies as any other private corporation.

Two personal remedies are open in a case of maritime contract or tort; *in personam* in admiralty, and at law in a state or federal court, with or without a trial by jury. Par. 3, § 24, Jud. Code. *Cohn* v. *Fleet Corp'n,* 20 F. (2d) 56; *Fleet Corp'n* v. *Eichberg,* 14 F. (2d) 248; *South Atl. Dry Dock Co.* v. *Fleet Corp'n,* 284 Fed. 723; *Lord & Burnham Co.* v. *Fleet Corp'n,* 265 Fed. 955.

In equity, too, relief may be sought in matters of a maritime nature, because admiralty has no jurisdiction to entertain an equitable plea. *The Kalfarli,* 277 Fed. 391; *Simmons Trans. Co.* v. *Alpha Portland Cement Co.,* 286 Fed. 955; *The Owego,* 289 Fed. 263; *The Thomas P. Beal,* 298 Fed. 121.

These remedies are concurrent, and an injured party may elect to avail himself of any one of them. *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109; *Leon* v. *Galceron,* 11 Wall. 185.

The only remedy barred by the Suits in Admiralty Act, is that *in rem* against vessels owned or operated by the Fleet Corporation of the United States; personal remedies are not superseded.

The main purpose of the Act was to relieve the United States and the Corporation from the embarrassment caused by seizure and arrest of vessels. *Eastern Trans. Co.* v. *United States,* 272 U. S. 675; *Blamberg Bros.* v. *United States,* 260 U. S. 452; *Shewan & Sons* v. *United States,* 266 U. S. 108; *Nahmeh* v. *United States,* 267 U. S. 122.

From the fact that Congress carefully expressed its intention to withdraw the right *in rem,* it follows that if the right to sue the Fleet Corporation, either at law or in admiralty, *in personam,* and the right to sue the

United States in the Court of Claims or under the Tucker Act, were likewise intended to be withdrawn, similar careful expression would have been expected.

The Suits in Admiralty Act does not expressly repeal the ordinary and general liability of the Fleet Corporation conferred by its organization as required by § 11 of the Shipping Act of 1916 (39 Stat. 728) under the general incorporation laws of the District of Columbia. Code, Dist. of Col., § 670, Sub-chapter 4, p. 159.

The liability, which arose prior to the passage of the Act, under the statutes referred to, can not be extinguished or modified unless the later statute expressly so provides. *Hertz* v. *Woodman,* 218 U. S. 205; *Great Northern Ry.* v. *United States,* 208 U. S. 452; *United States* v. *Reisinger,* 128 U. S. 398; *Warren* v. *Garber,* Hughes 365, 29 Fed. Case 17196; *Tinker* v. *Van Dyke,* 1 Flipp. 521, Fed. Case 14058; *Bradbury* v. *Galloway,* 3 Sawy. 343, Fed. Case 1764.

Repeals by implication are not favored. *Henrietta Mining etc. Co.* v. *Gardiner,* 173 U. S. 123; *France* v. *Connor,* 161 U. S. 65.

Without exception, the lower courts have held that the Suits in Admiralty Act does not provide an exclusive remedy. Thus: actions for breach of maritime contracts; *Fleet Corp'n* v. *Texas Mills,* 12 F. (2d) 9; *Wright & Co.* v. *Fleet Corp'n,* 285 Fed. 647; *Bellbuckle-Armand Schmoll, Inc.* v. *U. S. & Australasia S. S. Co. & Fleet Corp'n,* 217 N. Y. S. 883; *Dietrich* v. *Fleet Corp'n,* 9 F. (2d) 733; suits in admiralty *in personam* for cargo damage; *Fleet Corp'n* v. *Banque-Russo, etc.,* 286 Fed. 918, affirming 266 Fed. 897 and 281 Fed. 886; *Fidelity Trust Co.* v. *Fleet Corp'n,* 15 F. (2d) 600; *Marshall Hall Grain Co.* v. *Fleet Corp'n,* 14 F. (2d) 141; *Smith* v. *Fleet Corp'n,* 2 F. (2d) 390; for personal injuries to sea-

men; *Stewart* v. *Fleet Corp'n,* 7 F. (2d) 676; *Wallace* v. *Fleet Corp'n,* 5 F. (2d) 234; *Fleet Corp'n* v. *O'Shea,* 5 F. (2d) 123; *Lembeck* v. *Fleet Corp'n,* 9 F. (2d) 558; actions against the United States under the Tucker Act, arising out of maritime contracts; *Markle* v. *United States,* 8 F. (2d) 90; *Bennett-Day Importing Co.* v. *United States,* 8 F. (2d) 83; *Sutherland* v. *United States,* 1924 A. M. C. 1578; *The Barge Peerless,* 2 F. (2d) 395; *Hidalgo Steel Co.* v. *Moore & McCormick,* 298 Fed. 331; or for salvage services or upon maritime contracts; *Prince Line, Ltd.* v. *United States,* 61 Ct. Cls. 632; *Venezuela Meat Export Co.* v. *United States,* 58 Ct. Cls. 76.

The time limit in the Act is held inapplicable to suits apart from it. *Fidelity Trust Co.* v. *Fleet Corp'n,* 15 F. (2d) 600; *Marshall Hall Grain Co.* v. *Fleet Corp'n,* 14 F. (2d) 141; *Stewart* v. *Fleet Corp'n,* 7 F. (2d) 676; *Markle* v. *United States,* 8 F. (2d) 90; and likewise the clause limiting recovery of interest to 4%. *Fleet Corp'n* v. *Texas Mills,* 12 F. (2d) 9.

In certain of the foregoing cases, the lower courts reached the conclusion that the Act was not exclusive, with full cognizance of the fact that it permitted suits strictly *in personam* without regard to the requisites of actions *in rem,* as well as suits *in personam* as substitutes for actions *in rem.* See: *Markle* v. *United States,* 8 F. (2d) 90; *Wright & Co.* v. *Fleet Corp'n,* 285 Fed. 647; *Smith* v. *Fleet Corp'n,* 2 F. (2d) 390; *Fidelity Trust Co.* v. *Fleet Corp'n,* 15 F. (2d) 600; *Fleet Corp'n* v. *Texas Mills,* 12 F. (2d) 9.

No uniform procedure governing cases arising out of the operation of merchant vessels would be accomplished by holding the Act to provide the exclusive remedy in admiralty, because suits could still be brought at law or under the Tucker Act or in the Court of Claims.

These suits are not barred, because the statute of limitations prescribed is not pleaded. *Burnet* v. *Desmornes y Alvarez,* 226 U. S. 145; *Gormley* v. *Bunyan,* 138 U. S. 623; *Shields* v. *Schiff,* 124 U. S. 351; *Sanger* v. *Nightingale,* 122 U. S. 176; *Alexander* v. *Bryan,* 110 U. S. 414; *Sullivan* v. *Portland etc. R. R. Co.,* 94 U. S. 806; *The Harrisburg,* 119 U. S. 199; *Boyd* v. *Clark,* 8 Fed. 849; *Theroux* v. *Northern Pacific,* 64 Fed. 84; *Hutchings* v. *Lamson,* 96 Fed. 720; *Whitman* v. *Citizens Bank,* 110 Fed. 503. Nor were these suits barred by laches.

Under her bills of lading, *The West Aleta* had no right to pass beyond Cardiff and Rotterdam to Hamburg and then return over the same course.

Mr. Jacob Telfair Smith filed a brief as *amicus curiae* on behalf of Catz American Shipping Company, by special leave of Court.

Mr. Justice Sanford delivered the opinion of the Court.

These are consolidated libels *in personam,* brought in admiralty by the respondents against the Shipping Board Emergency Fleet Corporation in the Federal District Court for Northern California, in October, 1922, and November, 1923, to recover the value of goods shipped by them in December, 1919, and January, 1920, from San Francisco to ports in Wales and Holland, on the *West Aleta,* a merchant vessel owned by the United States and operated by the Fleet Corporation.[1] The libels alleged that the vessel deviated from the agreed voyage, passing the destined ports without entering and proceeding on a voyage to a port in Germany, and that in the course and by reason of such deviation the vessel stranded upon an island in the North Sea and became a total loss, with all

[1] The process was served on the Fleet Corporation.

her cargo. The Fleet Corporation filed exceptions to the libels on the ground, among others, that they were filed more than one year after the Suits in Admiralty Act[2] had gone into effect, and that by and under the provisions of that Act and particularly § 5 thereof the alleged causes of action were barred. These exceptions were overruled. 295 Fed. 372. The Fleet Corporation then answered, relying on the liberties clause in the bills of lading, denying that there had been any deviation, and alleging that the loss was caused by risks and perils for which it was not liable under the bills of lading and the Harter Act.[3] The District Court, on the hearing, finding that there had been an unauthorized deviation and that the suits were not barred or affected by the Suits in Admiralty Act, entered decrees in favor of the libelants for the value of the goods, with interest at the rate of 7 per cent. 7 F. (2d) 893. These were affirmed by the Circuit Court of Appeals, which held that there had been an unwarranted deviation and that the Suits in Admiralty Act was not applicable, since its purpose was to substitute an action *in personam* for one *in rem*, and no suit *in rem* could have been brought as the vessel had been wrecked off the coast of a foreign country and was a total loss. 12 F. (2d) 721.

The first contention of the Fleet Corporation is that these suits were barred by the limitation contained in § 5 of the Suits in Admiralty Act.

That Act, whose main provisions are set forth in the margin,[4] was approved and went into effect on March 9,

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[2] 41 Stat. 525, c. 95; U. S. C., Tit. 46, § 741 *et seq.*

[3] 27 Stat. 445, c. 105.

[4] The Act provides: "That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of . . or operated by or for the United States or such corporation . . shall hereafter, in view of the provision herein made for a libel in

1920—several months after the alleged causes of action had arisen and more than a year before the libels were brought. It provided that no vessel owned by the United States or any corporation in which the United States or its representatives own the entire outstanding capital stock, or in the possession of or operated by or for the United States or such corporation, should be subject to arrest or seizure by judicial process, § 1; that where such vessel was employed as a merchant vessel and a proceed-

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personam, be subject to arrest or seizure by judicial process in the United States . . .

"Sec. 2. That in cases where if such vessel were privately owned or operated . . a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel. Such suits shall be brought in the district court of the United States for the district in which the parties so suing . . reside or have their principal place of business . . or in which the vessel . . charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. .

"Sec. 3. That such suits shall proceed and be heard and determined according to the principles of law and . . rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum . . or at any higher rate which shall be stipulated. . If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel . . been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States . . or the United States Ship-

ing in admiralty could be maintained if it were privately owned or operated, a libel *in personam* might be brought against the United States or such corporation, as the case might be, § 2; and that suits based on causes of action arising prior to the Act should be brought within one year after it went into effect, § 5.

It is unquestioned that the Fleet Corporation is one which may be sued by a libel *in personam* under the provisions of the Act.[5]

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ping Board Emergency Fleet Corporation, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.

"Sec. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises. . .

"Sec. 8. That any final judgment rendered in any suit herein authorized . . shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or . . fund especially available therefor; otherwise there is hereby appropriated out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment. .

"Sec. 12. That the Attorney General shall report to the Congress at each session thereof the suits under this Act in which final judgment shall have been rendered . . against the United States and such aforesaid corporation.

"Sec. 13. That the provisions of all other Acts inconsistent herewith are hereby repealed."

[5] All of the capital stock of the Fleet Corporation is owned and held by the United States Shipping Board on behalf of the United States, *United States* v. *McCarl*, 275 U. S. 1; in operating merchant vessels it acts for and on behalf of the United States, *Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415; and it is referred to specifically in § 4 of the Act.

In *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 689–692 (1927), we held that, while the main purpose of the Act was to exempt from seizure and arrest merchant vessels of the United States operated by it and its subordinate shipping corporations and to substitute for a suit *in rem* one *in personam* attended with the incidents of a proceeding *in rem* in which the personal liability of the United States took the place of the vessel, the Act also had a wider effect and created a broader personal obligation of the United States, as the owner of an offending vessel, like that of a private owner, which might be enforced in admiralty by a libel *in personam* in cases where there was no basis for an action *in rem.*

In view of this decision the libelants do not now contend, as in the Circuit Court of Appeals, that the Act merely authorized a libel *in personam* as a substitute for a proceeding *in rem.* And the question here presented as to the effect of the Act is whether, as the Fleet Corporation contends, the remedy given against it by a libel *in personam* in admiralty under the provisions of the Act, is exclusive; or whether, as the libelants contend, this remedy is not exclusive and the Fleet Corporation may also, as a private corporation, be sued in admiralty by a libel *in personam,* independently of the provisions of the Act.

The Act not only authorizes libels *in personam* to be brought in admiralty against the United States or the designated corporations on causes of action arising out of the possession or operation of merchant vessels, §§ 1, 2, but fixes the venue in such suits, § 2;—requires service on the United States or the corporation to be made upon the United States attorney, with notice to the Attorney General, § 2;—applies to the suits the principles of law and rules of practice obtaining in like cases between private parties, § 3;—limits the rate of interest which may

be included in a money decree against the United States or the corporation, to 4 per cent. unless otherwise stipulated, § 3;—exempts the United States or the corporation from the giving of any bond or admiralty stipulation, and provides that those previously given in any admiralty cause shall be canceled upon the assumption of liability by the United States, § 3;—requires suits based on causes of action that had arisen before the Act to be brought within one year after it goes into effect, and all other suits within two years after the cause of action arises, § 5;—directs that the final judgments rendered in the suits, as well as those in previous admiralty causes in which the United States assumes liability, shall be paid by the accounting officers of the United States out of money in the Treasury, for which an appropriation is made, §§ 3, 8;—requires the Attorney General to report to each session of Congress all final judgments rendered against the United States or the corporation;—and specifically repeals "the provisions of all other Acts" inconsistent with the Act, § 13.

The Act plainly relates to causes of action which had previously arisen,[6] as well as to those subsequently arising. It provides a remedy in admiralty for adjudicating and satisfying all maritime claims arising out of the possession or operation of merchant vessels of the United States and the corporations, in which the obligation of the United States is substituted for that of the corporations. To that end it furnishes a complete system of administration, applying to the United States and the corporations alike, by which uniformity is established as to venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation; and not only provides that the

[6] Except as to those that had arisen prior to April 6, 1917, § 5.

judgments against the corporations, as well as those against the United States, shall be paid out of money in the Treasury, but repeals the inconsistent provisions of all other Acts.

In view of these provisions of the Act we cannot doubt that it was intended to furnish the exclusive remedy in admiralty against the United States and the corporations on all maritime causes of action arising out of the possession or operation of merchant vessels. And nothing in its legislative history indicates a different purpose.

It follows that after the passage of the Act no libel in admiralty could be maintained against the United States or the corporations on such causes of action except in accordance with its provisions; and that as the libels in these cases were not brought against the Fleet Corporation within the period prescribed by § 5 they were barred. And although, as the libelants point out, this was not "pleaded in any of the answers," it was aptly and sufficiently pleaded in the exceptions to the libels, which correspond to demurrers in actions at law.

Whether in addition to furnishing an exclusive remedy in admiralty, the Act also prevents a resort to any concurrent remedies against the United States or the corporations on like causes of action in the Court of Claims or in courts of law, is a question not presented by these cases and upon which, although referred to in the argument, we express no opinion. And it is unnecessary to determine other contentions of the Fleet Corporation relating to the questions of deviation and laches.

The decree of the Circuit Court of Appeals is reversed; and the cause will be remanded to the District Court with instructions to dismiss the libels.

Reversed.

MR. JUSTICE MCREYNOLDS is of opinion that the decree of the Circuit Court of Appeals should be affirmed.

LIBERTY NATIONAL BANK OF ROANOKE *v.* BEAR, TRUSTEE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 218. Argued October 7, 1927.—Decided February 20, 1928.

1. Under § 5a of the Bankruptcy Act, a partnership may be adjudicated a bankrupt as a separate entity, irrespective of any adjudication of bankruptcy against the partners as individuals. P. 220.
2. An involuntary petition filed against a partnership, which does not in terms seek an adjudication that the partners are bankrupts, as individuals, nor allege that as individuals they are insolvent or have committed any act of bankruptcy, is not in legal effect a petition against them individually; and an adjudication thereunder of the partnership's bankruptcy is not, in legal effect, an adjudication that the partners are bankrupt individually. P. 226.
3. Hence, in this case, there was no ground, under § 67c or § 67f of the Act, for annulling judgment liens obtained against the individual real estate of the partners within four months prior to the filing of the involuntary petition against the partnership, but more than eight months prior to filing of their individual voluntary petitions. P. 226.

18 F. (2d) 281, reversed.

CERTIORARI, 274 U. S. 731, to a decree of the Circuit Court of Appeals, which affirmed an order of the District Court, disallowing the claims of the bank as a secured creditor, based on a judgment lien against the individual estates of partners who filed voluntary petitions in bankruptcy after the partnership had been adjudicated a bankrupt. See also 285 Fed. 703; 4 F. (2d) 240; and 265 U. S. 365.

Mr. James D. Johnston for petitioner.

Mr. Harvey B. Apperson, with whom *Mr. James A. Bear* was on the brief, for respondent.

The adjudication of the partnership was in effect an adjudication of the individual members. *In re Meyer,*

98 Fed. 976; *In re Stokes,* 106 Fed. 312; *Dickas* v. *Barnes,* 140 Fed. 849; Black on Bankruptcy, (1922 Ed.), § 110; *Francis* v. *McNeal,* 228 U. S. 695; *Vaccaro* v. *Security Bank,* 103 Fed. 436; *In re Bretanshaw,* 157 Fed. 363; *Francis* v. *McNeal,* 186 Fed. 481; Pomeroy, Eq. Juris. (4th Ed.), §§ 2371, 2372.

The assets of the individual, being drawn into bankruptcy by the bankruptcy of the firm, will be administered as the Act requires. *Miller* v. *New Orleans Acid Co.,* 221 U. S. 496.

If the claimant is allowed to recover from the proceeds of sale of the individual estates every dollar of a debt which is in fact a partnership debt, there will be no equitable marshalling of the several estates, but in fact a most inequitable hardship will be imposed upon the other individual creditors of the individual partners. Sections 67c and 67f are to be considered and construed in connection with the other provisions of the Bankruptcy Act. The Trustee represents all four estates.

Meek v. *Centre County Banking Co.,* 268 U. S. 426, and *Myers* v. *International Trust Co.,* 273 U. S. 380, distinguished.

Mr. Justice Sanford delivered the opinion of the Court.

This is the bankruptcy proceeding which was before us at an earlier stage in *Liberty Natl. Bank* v. *Bear,* 265 U. S. 365.

In July, 1920, the Liberty National Bank brought suit in a Virginia court against the Roanoke Provision Company, a partnership composed of W. L. Becker, Sr., and W. L. Becker, Jr., and against the Beckers individually, and in the same month recovered a judgment against the Provision Company and the two Beckers individually, which being duly docketed, became, under the laws of Virginia,

a lien upon the real estate of the judgment debtors.[1] In August an involuntary petition in bankruptcy was filed in the Federal District Court against the Provision Company, as a partnership composed of the two Beckers; alleging that it had committed an act of bankruptcy by executing a general assignment for the benefit of creditors, and was insolvent. There was no allegation that the Beckers were individually insolvent, or had executed general assignments of their individual properties or committed any acts of bankruptcy; and there was no prayer that they be adjudged bankrupt individually. They filed a joint answer admitting the allegations of the petition; and the Company, as a partnership composed of the two Beckers, was adjudged a bankrupt by the District Judge, but without adjudging the bankruptcy of the Beckers as individuals.

In April, 1921—more than eight months after the partnership had been adjudged a bankrupt—the Beckers filed separate voluntary petitions in bankruptcy; and each was adjudged a bankrupt. The respondent Bear was then elected trustee for the partnership estate by the partnership creditors, and trustee for the individual estates by the individual creditors.

Thereafter the Bank filed proofs of claim on the judgment against the separate estates of the Beckers, alleging that it constituted a lien upon their individual real estate and was entitled to priority as such. The trustee filed objections on the ground that he had been vested with title to the property of the individual partners, as well as that of the partnership, as of the date of the filing of the petition in bankruptcy against the Company in August, 1920; and contended that as the judgment had been recovered within four months prior to the filing of that petition, the lien upon the individual properties was annulled by

[1] Code of 1919, §§ 6470, 6471.

§ 67f of the Bankruptcy Act.[2] The referee disallowed the claims of the Bank as secured claims, and allowed them as unsecured claims merely.[3] This order was reversed by the District Judge, on the ground that as the order adjudging the bankruptcy of the Company had not adjudged the bankruptcy of the Beckers individually, the lien of the judgment upon their individual properties had not been nullified. The Circuit Court of Appeals reversed this decree upon the ground that the "adjudication of the partnership was necessarily an adjudication of the bankruptcy of the individuals composing it, and that . . . the lien of a judgment obtained within four months of the filing of the petition against the partnership was lost by the adjudication." 285 Fed. 703. This Court—without determining whether the adjudication of the bankruptcy of the Company operated as an adjudication of the bankruptcy of the Beckers individually—held that as there was no pleading or proof as to the insolvency of the Beckers when the Bank recovered its judgment, there was no ground under § 67f of the Bankruptcy Act for annulling the lien thereby acquired upon their individual properties, and reversed the decree of the Circuit Court of Appeals and remanded the cause to the District Court for further proceedings not inconsistent with the opinion. *Liberty Natl. Bank* v. *Bear, supra,* 368.

The trustee, by leave of the District Court, then amended his objections to the claims of the Bank by alleging that the Beckers were insolvent when the judgment was recovered, and that if enforced as a secured claim against the individual estates the judgment would result

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[2] 30 Stat. 544, c. 541; U. S. C., Tit. 11.

[3] The referee at the same time disallowed another claim of the Bank to a lien upon the real real estate of the partnership; but no steps were taken by the Bank to review his order in this respect; and no question as to this matter is here involved.

in preferences; [4] and contended that the lien upon the individual properties was also annulled by § 67c of the Bankruptcy Act. It was then stipulated that the Beckers were insolvent when the judgment was obtained, and that the enforcement of the judgment as a secured claim against the individual properties would enable the Bank to obtain a greater percentage of its debt from such assets than other individual creditors,—there being no surplus from individual assets to be applied to partnership debts, and none from partnership assets to be applied to individual debts. The referee again disallowed the claims of the Bank as secured claims against the individual estates of the Beckers. This was affirmed by the District Court, without opinion, and by the Circuit Court of Appeals, which adhered to its original ruling as to the effect of the order adjudicating the bankruptcy of the partnership. 18 F. (2d.) 281.

The controversy here is solely between the Bank and the trustee as the representative of the other individual creditors of the Beckers; the partnership creditors having no interest therein as there is no surplus of the individual estates to be applied to partnership debts.

The trustee relies upon both §§ 67c and 67f of the Bankruptcy Act. Sec. 67c provides that: "A lien created by or obtained in or pursuant to any suit . . which was *begun against a person within four months before the filing of a petition in bankruptcy by or against such person* shall be dissolved by the adjudication of such person to be a bankrupt if . . it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference . . ." Sec. 67f provides: "That all levies, judg-

[4] This was affirmed by the Circuit Court of Appeals on an interlocutory appeal. 4 F. (2d) 240.

ments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, *at any time within four months prior to the filing of a petition in bankruptcy against him,*[5] shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the . . lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt . . ."

It is indisputable that under these provisions the judgment liens upon the real estate of the Beckers cannot be annulled unless they were adjudged bankrupts under petitions in bankruptcy filed within four months after the suit against them was commenced, § 67c, or the judgment liens obtained, § 67f. This being unquestioned, the trustee does not claim that the liens were annulled under the voluntary petitions of the Beckers which were filed after the expiration of the prescribed periods. His sole contention is that they were annulled by the proceedings under the involuntary petition filed against the Provision Company within such periods. As to this he insists that—although the petition was filed against the partnership alone and the partnership alone was adjudged a bankrupt—the petition was, in effect, a petition against the individual partners, as well as the partnership, and the adjudication was, in effect, an adjudication that the individual partners as well as the partnership were bankrupts; that is, that the adjudication that the partnership was a bankrupt necessarily imported an adjudication that the individual partners were also bankrupts.

This contention disregards entirely the principle established by the Bankruptcy Act that a partnership may be adjudged a bankrupt as a separate entity without refer-

[5] The phrase "A person against whom a petition has been filed" as defined by § 1 (1) of the Bankruptcy Act, includes "a person who has filed a voluntary petition."

ence to the bankruptcy of the partners as individuals. In this respect the Act makes a complete change from the earlier Bankrupt Law of 1867, which did not permit the partnership entity to be adjudged a bankrupt, but merely provided that when two or more persons who were partners in trade were adjudged bankrupt, the property of the partnership, as well as that of the partners, should be taken over by the bankruptcy court for administration.[6] The present Act not only omits this provision of the Law of 1867, but—after providing generally that the word "persons" when used in the Act shall include "partnerships," § 1 (19), and that a petition in bankruptcy may be filed against a "person" who is insolvent and has committed an act of bankruptcy, § 3 (b)—specifically declares in § 5a that: "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."[7] Under this provision, as was

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[6] 14 Stat. 517, c. 176, § 36; R. S. § 5121.

[7] Sec. 5 of the present Act, which was substituted for § 36 of the Law of 1867, reads as follows:

"Sec. 5. PARTNERS—a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

"b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

"c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

"d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

"e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

"f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds

said in *Meek* v. *Centre County Banking Co.*, 268 U. S. 426, 431, there "can be no doubt that a partnership may be adjudged a bankrupt as a distinct legal entity." And if proceeded against as a distinct legal entity, without reference to the individual partners, it may, as such, under § 12a, offer terms of composition to the partnership creditors alone. *Myers* v. *Internat. Trust Co.*, 273 U. S. 380, 383.

It has long been the established rule in the Circuit Courts of Appeals and District Courts that under § 5a of the Act a partnership may be adjudged a bankrupt as a separate entity, under a voluntary or involuntary petition, irrespective of any adjudication of bankruptcy against the individual partners. *In re Meyer* (C. C. A.), 98 Fed. 976, 979, affirming *Chemical National Bank* v. *Meyer* (D. C.), 92 Fed. 896, 901; *In re Mercur* (C. C. A.), 122 Fed. 384, 387, affirming *In re Mercur* (D. C.), 116

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of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

"g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

"h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

Fed. 655, 658; *In re Stein & Co.* (C. C. A.), 127 Fed. 547, 549; *Dickas* v. *Barnes* (C. C. A.), 140 Fed. 849, 851; *In re Bertenshaw* (C. C. A.), 157 Fed. 363, 368; *Mills* v. *Fisher & Co.* (C. C. A.), 159 Fed. 897, 899; *Francis* v. *McNeal* (C. C. A.), 186 Fed. 481, 483; *In re Samuels* (C. C. A.), 215 Fed. 845, 847; *Armstrong* v. *Fisher* (C. C. A.), 224 Fed. 97, 99; *Carter* v. *Whisler* (C. C. A.), 275 Fed. 743, 746; *In re Dunnigan* (D. C.), 95 Fed. 428, 429; *In re Duguid* (D. C.), 100 Fed. 274, 278; *In re Barden* (D. C.), 101 Fed. 553, 555; *Strause* v. *Hooper* (D. C.), 105 Fed. 590, 592; *In re Stokes* (D. C.), 106 Fed. 312, 313; *In re Hale* (D. C.), 107 Fed. 432, 433; *In re Farley* (D. C.), 115 Fed. 359, 360; *In re Pincus* (D. C.), 147 Fed. 621, 625; *In re Solomon & Carvel* (D. C.), 163 Fed. 140, 141; *In re Everybody's G. & M. Market* (D. C.), 173 Fed. 492, 493; *In re Lattimer* (D. C.), 174 Fed. 824, 826; *In re Perlhefter* (D. C.), 177 Fed. 299, 305; *In re Lenoir-Cross & Co.* (D. C.), 226 Fed. 227, 229.[8] This rule has been applied not only where the petition in bankruptcy sought merely the adjudication of the partnership as a bankrupt, but where the adjudication of the individual partners was also sought. Thus in some cases the partnership was adjudged a bankrupt, although the court refused to adjudge the bankruptcy of the individual partners, either because they had not committed individual acts of bankruptcy, or because, being wage earners or tillers of the soil, they were exempt from

[8]And even in *Re Forbes* (D. C.), 128 Fed. 137, 139, in which the District Court for Massachusetts held that there could be no bankruptcy of a partnership without the bankruptcy of all the partners, it was recognized that this would not apply in "exceptional cases such as *In re Dunnigan* (D. C.), 95 Fed. 428," *supra*, in which it had been held, in the same district, that a partnership might be adjudged a bankrupt although one partner, being a minor, could not be so adjudged.

involuntary bankruptcy, or because they were insane, or minors.[9]

This rule, often announced, is based upon the plain words of the Bankruptcy Act. The specific provision in § 5a that a partnership—a person within the meaning of the Act—"may be adjudged a bankrupt," distinctly implies that it may be adjudged a bankrupt as a separate entity without reference to the bankruptcy of the individual partners. This implication is strengthened by the fact that there is no requirement in § 5 that the partners shall be joined as defendants in a petition filed against the partnership, and no provision that the partners shall be adjudged to be bankrupts under such a petition or that such individual adjudications shall be a prerequisite to the adjudication of the bankruptcy of the partnership; as well as by the fact that while § 5 of the Act incorporated most of the administrative provisions in the corresponding section of the Bankrupt Law of 1867, it omitted the provision for granting discharges to the individual partners. That is, the adjudication of the bankruptcy of the individual partners was left solely to the general provisions of the Act, under which no person could be adjudged a bankrupt in involuntary bankruptcy unless he was not only insolvent but had committed an act of bankruptcy, and not even then if he were a wage earner or tiller of the soil, § 3a, b; § 4b.

We cannot believe that Congress intended to limit and weaken the broad provision of § 5a permitting a partnership to be adjudged a bankrupt, by making it essential to

[9] Neither of two incidental questions upon which the lower federal courts have differed in opinion—whether a partnership can be deemed insolvent as an entity when the individual partners are solvent, and whether a bankruptcy court which has adjudged a partnership a bankrupt may take possession of the individual property of a partner who has not been adjudged a bankrupt so far as is necessary to pay the partnership debts—is here involved.

such an adjudication that the partners should also be adjudged bankrupt individually. So to hold would make it impossible, in an involuntary proceeding, to adjudge bankrupt a partnership as a separate entity, although it was insolvent and had committed an act of bankruptcy, if any of the partners could not be adjudged a bankrupt because he had not committed an individual act of bankruptcy or was a person exempt from such an adjudication, or for other adequate reason.[10]

The conclusion stated is not in conflict with the decision in *Francis* v. *McNeal,* 228 U. S. 695, upon which the trustee relies. That decision, as we have heretofore pointed out in *Liberty Natl. Bank* v. *Bear, supra,* 368, and *Meek* v. *Centre County Banking Co., supra,* 432, did not involve the question whether an adjudication of the bankruptcy of a partnership involved the adjudication of the bankruptcy of the partners, but merely involved the question whether a bankruptcy court in which an insolvent partnership had been adjudged a bankrupt might under the administrative provisions of § 5 require a partner who had not been adjudged a bankrupt to surrender his individual property to the trustee of the partnership estate for the purpose of paying the partnership debts. There was no claim or suggestion that the adjudication of the bankruptcy of the partnership had involved an adjudication of the bankruptcy of the partner as an individual, or that under that adjudication he could be deemed a bankrupt individually or a trustee could be appointed of his individual estate for the purpose of administering it as that of a bankrupt.

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[10]As was said by the late Judge Hough, § 5a "sympathetically interpreted secures to the creditor a prompt seizure of firm assets,—without regard to dead, insane, absent, dormant or secret partners, who as experience shows are commonly used by the active members to harass and obstruct those holding just demands against the firm." 8 Columb. Law Rev. 599, 604

We conclude that the involuntary petition filed against the Provision Company, which did not in terms seek an adjudication that the Beckers were bankrupts as individuals, nor allege that as individuals they were insolvent or had committed any acts of bankruptcy, was not in legal effect a petition filed against them individually, and the adjudication under that petition that the partnership was a bankrupt, was not in legal effect an adjudication that they were bankrupts individually. There is hence no ground, under either § 67c or § 67f of the Act, for annulling the judgment liens obtained upon their individual real estate more than eight months prior to the filing of their voluntary petitions.

Reversed.

COMMERCIAL CREDIT COMPANY *v.* UNITED STATES

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 258. Argued November 21, 22, 1927.—Decided February 20, 1928.

1. Upon review by certiorari, no questions will be considered except those on which the petition for the writ was based. P. 229.
2. Where a person discovered in the act of unlawfully transporting intoxicating liquor in a vehicle is proceeded against as prescribed by § 26 of the Prohibition Act, and convicted of the unlawful possession incident to the transportation, the vehicle must be disposed of under that section also, which provides protection for the interests of innocent owners or lienors, and not under Rev. Stats. § 3450, which does not provide such protection. P. 232.

17 F. (2d) 902, reversed.

CERTIORARI, 275 U. S. 511, to a judgment of the Circuit Court of Appeals, which affirmed a decree of the District Court, forfeiting a motor vehicle under § 3450 of the Revised Statutes upon the ground that it had been used

in the removal, deposit and concealment of intoxicating liquor, with intent to defraud the United States of the tax thereon. The present petitioner intervened in the libel proceedings to assert its title to the car.

Mr. Duane R. Dills, with whom *Messrs. Frank H. Towsley, John J. Kennett,* and *Charles W. Haswell* were on the brief, for petitioner.

Solicitor General Mitchell, with whom *Assistant Attorney General Mabel Walker Willebrandt* and *Mr. Mahlon D. Kiefer,* Chief Attorney, Department of Justice, were on the brief, for the United States.

There is no direct conflict between § 26 and § 3450. Section 26 may be construed to make forfeiture proceedings under it permissive, not mandatory. A provision in one statute authorizing forfeiture of guilty interests in a car used for illegal transportation, is not in direct conflict with another statute providing that the whole value of the vehicle may be forfeited if its use is in violation of the Revenue or Customs Laws.

Mere institution of a prosecution for an offense under one statute does not bar proceedings for a violation of another. *Carter* v. *McClaughry,* 183 U. S. 365; *Albrecht* v. *United States,* 273 U. S. 1; *Morey* v. *Commonwealth,* 108 Mass. 433; *United States* v. *Torres,* 291 Fed. 138; *United States* v. *One Ford Coupe,* 272 U. S. 321; *Port Gardner Investment Company* v. *United States,* 272 U. S. 564.

A conviction of the individual for illegal possession, or any other offense, excepting illegal transportation, under the National Prohibition Act, is no bar to a proceeding *in rem* for forfeiture of the vehicle for tax evasion under § 3450. Such a proceeding is not a prosecution within the meaning of § 5 of the Supplemental Act. There is no such offense as "possession in transportation." Where a

conviction for possession occurs, no forfeiture of a vehicle under § 26 is entailed, and that section does not come into operation.

The finding of the District Court that an internal-revenue tax was due and unpaid is not open to question here, because not raised in the application for certiorari. See *United States* v. *One Ford Coupe, supra; Port Gardner Investment Company case, supra; United States* v. *385 Barrels of Wine,* 300 Fed. 565.

Mr. JUSTICE SANFORD delivered the opinion of the Court.

This is a libel brought by the United States in November, 1925, in the Federal court for the Western District of Washington, under § 3450 of the Revised Statutes,[1] to forfeit a Ford coupe upon the ground that it had been used in the removal, deposit and concealment of intoxicating liquor, with intent to defraud the United States of the tax thereon. The Commercial Credit Co. intervened as claimant, asserting title to the car and alleging that it had no knowledge that the car was used or intended to be used in violation of law.

By stipulation of the parties the case was heard by the district judge without the intervention of a jury. The evidence showed that in October a customs inspector who, in consequence of reports that this car was being used to distribute Canadian liquor about the city of Seattle, had

[1] U. S. C., Tit. 26, § 1181. This section provides that: "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed . . are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, . . every vessel, boat, cart, carriage, or other conveyance whatsoever . . used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."

watched its movements for some days, discovered one Campbell—who had purchased the car under a conditional sale—in the act of backing the car out of an alley in the rear of his house, stopped the car, searched it, found that it contained thirteen quarts of whiskey and gin, arrested Campbell, and seized the car. The liquor bore labels indicating that it was of foreign manufacture, and there were no stamps on the bottles showing the payment of duty or internal revenue taxes. It was also stipulated at the hearing that Campbell was prosecuted in the District Court under the National Prohibition Act [2] on the charges of "unlawful possession and transportation of liquor and plead guilty to unlawful possession, whereupon the Government dismissed as to the transportation, and that covers the identical transaction here involved." Thereafter the Government brought the libel to forfeit the car.[3] At the close of the evidence the claimant moved to dismiss the libel, on the ground, among others, that the United States had elected to proceed under the National Prohibition Act and was barred from proceeding under § 3450. The district judge denied this motion, and entered a decree condemning and forfeiting the car to the United States. This was affirmed by the Circuit Court of Appeals, which held that as Campbell's conviction of unlawfully possessing intoxicating liquor was under § 3 of Title II of the Prohibition Act and did not entail a disposition of the car under § 26 of that Title, the Government was at liberty to proceed under § 3450 for the forfeiture of the car. 17 F. (2d) 902.

The petition for the writ of certiorari was based solely on the ground that under § 26 of the Prohibition Act the

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[2] 41 Stat. 305, c. 85; U. S. C., Tit. 27.

[3] This appeared inferentially and, we understand, is admitted.

Government was barred from proceeding to forfeit the car under § 3450; and no other question will be considered. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242; *Webster Co.* v. *Splitdorf Co.*, 264 U. S. 463, 464; *Steele, Executor,* v. *Drummond,* 275 U. S. 199.

Sec. 26 provides that: "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possesion of the vehicle . . and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond . . approved by said officer and . . conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested . . unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts."

The essential distinction between § 26 and § 3450 in so far as relates to the forfeiture of a vehicle is that where § 26 is the only applicable provision for its forfeiture the interests of innocent owners and lienors are not forfeited, but where it may be forfeited under § 3450 by reason of its use to evade the payment of a tax the interests of those who are innocent are not saved. *United States* v. *One Ford Coupe,* 272 U. S. 321, 325.

In *Port Gardner Co.* v. *United States,* 272 U. S. 564, 566, which came to this Court on a certificate of the Circuit Court of Appeals, the driver of an automobile, seized by prohibition agents, had been charged with possession and transportation of intoxicating liquor in violation of the Prohibition Act, and had pleaded guilty to both charges and been sentenced. In answering one of the questions presented by the certificate we held that the "prosecution with effect" of the driver of a car under the National Prohibition Act constituted "an election by the Government to proceed under § 26 of that Act," and thereby prevented the forfeiture of the car under § 3450. As to this we said: "The disposition of the automobile prescribed in § 26 became mandatory after" the driver's "conviction; and being inconsistent with the disposition under § 3450 necessarily precluded resort to proceedings under the latter section."

The claimant states that the question here presented is that which was referred to in a concurring opinion in the *Port Gardner Co.* case, 567, namely, "whether the prohibition officer discovering one in the act of transportation may disregard the plain and direct commands of § 26 to proceed against the vehicle as there directed"; and on that assumption the arguments have been largely directed to the question whether, whenever an officer discovers a person in the act of transporting intoxicating liquor in a vehicle, the provisions of § 26 become mandatory in such sense as to furnish the exclusive remedy for the forfeiture

of the vehicle.[4] But, since it appears that the officer in fact seized the vehicle and arrested Campbell, who was in fact proceeded against under the Prohibition Act, the question of the officer's duty to proceed under § 26 is not here involved.

In this case Campbell was prosecuted both for the unlawful possession and the unlawful transportation of the intoxicating liquors. These are made criminal offenses by § 3 of Title II of the Prohibition Act, and are punishable under § 29 of that Title. Sec. 26—although not in itself making either of these acts a criminal offense—provides that when an officer discovers a person in the act of unlawfully transporting intoxicating liquor in a vehicle, he shall seize both the vehicle and the intoxicating liquors "transported or possessed illegally," arrest such person, and proceed against him under the Prohibition Act; and that if such person is convicted the vehicle shall be disposed of as therein prescribed.

The stipulation in this case, read in the light of the evidence, shows that the unlawful possession for which Campbell was prosecuted, and of which he pleaded guilty, was not a separate possession antecedent to and independent of the transportation—which would not have entailed a forfeiture of the car under § 26—but was the possession involved in and incidental to the transportation itself, that is, the "possession in transportation" referred to in *United States* v. *One Ford Coupe, supra,* 334.

Campbell's conviction on the charge of such possession, following his arrest when discovered in the act of transportation, required, we think, a disposition of the car under the provisions of § 26. That section, read in its entirety, governs the disposition of the car where the

[4] This question was not involved in *United States* v. *One Ford Coupe, supra,* 334, in which it did not appear that any person had been discovered in the act of transporting intoxicating liquor in the car.

person in charge of the vehicle is convicted of the unlawful possession incidental to the transportation, as well as where he is convicted of the unlawful transportation itself. Therefore, under the doctrine of the *Port Gardner Co.* case, the disposition of the car under § 26 becoming mandatory after Campbell's conviction " and being inconsistent with the disposition under § 3450, necessarily precluded resort to a proceeding under the latter section."

This renders it unnecessary to consider whether, if Campbell had not been convicted of the unlawful possession, the Government's voluntary dismissal of the charge of unlawful transportation, before trial, would likewise have precluded a resort to § 3450.

The decree of the Circuit Court of Appeals is reversed; and the cause will be remanded to the District Court with instructions to dismiss the libel.

Reversed.

MR. JUSTICE STONE did not sit in this case.

HELLMICH, COLLECTOR, *v.* ISADORE N. HELLMAN.

SAME *v.* MILTON C. HELLMAN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 299, 300. Argued January 4, 5, 1928.—Decided February 20, 1928.

1. Under the Revenue Act of 1918, amounts distributed to the stockholders of a liquidating corporation out of earnings and profits accumulated by the corporation since February 28, 1913, are not to be treated as " dividends," which, under § 201 (a), are exempt from normal tax, but as payments made by the corporation in exchange for its stock, which are taxable " as other gains or profits." § 201 (c). P. 236.

2. The objection that this results in double taxation, cannot prevail over the clearly expressed intention of the statute. P. 237.
18 F. (2d) 239, 244, reversed.

CERTIORARI, 275 U. S. 513, to review two judgments of the Circuit Court of Appeals sustaining recoveries of money paid under protest as income taxes.

Assistant Attorney General Mabel Walker Willebrandt, with whom *Solicitor General Mitchell* and *Mr. Sewall Key*, Attorney in the Department of Justice, were on the brief, for petitioner

Mr. Henry H. Furth for the respondents.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The two Hellmans brought these suits against the Collector to recover additional income taxes assessed against them for the year 1919, under Title II of the Revenue Act of 1918,[1] and paid under protest. They recovered judgments in the District Court, which were affirmed by the Circuit Court of Appeals. 18 F. (2d) 239 and 244.

The question here is whether the gains realized by stockholders from the amounts distributed in the liquidation of the assets of a dissolved corporation, out of its earnings or profits accumulated since February 28, 1913, were taxable to them as other "gains or profits," or whether the amounts so distributed were "dividends" exempt from the normal tax.

Sec. 201(a) of the Act defined the term "dividend" as "any distribution made by a corporation . . to its shareholders . . , whether in cash or in other property . . , out of its earnings or profits accumulated since February 28, 1913 . . " Sec. 201(c) provided that: "Amounts dis-

[1] 40 Stat. 1057, 1058, c. 18.

tributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits." Sec. 216(a) provided that for the purpose of determining the "normal tax" upon the net income of an individual (§ 210), there should be allowed as a credit the "amount received as dividends from a corporation which is taxable . . upon its net income."

Treasury Regulations 45, which were promulgated under the Act, stated on the one hand, in Art. 1541, that for the purpose of the statute "dividends" comprise distributions made by a corporation to its stockholders "in the ordinary course of business, even though extraordinary in amount;" and, on the other hand, in Art. 1548, that: "So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payments for the stock of the dissolved corporations. Any excess so received over the cost of his stock to the stockholder, or over its fair market value as of March 1, 1913, if acquired prior thereto, is a taxable profit. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock."[2] These Regulations, with a change made in 1921 as to the second sentence of Art. 1548,[3] are still in effect so far as distributions in liquidation under the Act are concerned.

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[2] Regulations 45, 1919 ed., 237, 240.

[3] By Treas. Dec. 3206 the following sentences were substituted for the second sentence: "Any excess so received over the cost of his stock to the stockholder constitutes income to such stockholder.

Each of the Hellmans owned one-half of the capital stock of a corporation which had a net surplus of $46,466.27, of which at least $31,545.58 consisted of earnings and profits accumulated since February 28, 1913. In 1919, the corporation was dissolved and liquidated and its assets were distributed to the stockholders. In this liquidation each of the Hellmans realized a gain of $15,004.55 in the distribution made out of the earnings and profits accumulated since February 28, 1913. Each in his income tax return claimed that this was a "dividend" which under § 216(a) was to be credited on his net income for the purpose of the normal tax. The Commissioner of Internal Revenue, ruling these were gains subject to the normal tax, disallowed the claims and made the additional assessments here involved.

The decision of the Circuit Court of Appeals in this case is in direct conflict with that of the Circuit Court of Appeals for the Sixth Circuit in *Langstaff* v. *Lucas* (C. C. A.) 13 F. (2d) 1022.

The controlling question is whether the amounts distributed to the stockholders out of the earnings and profits accumulated by the corporation since February 28, 1913, were to be treated under § 201(a) as "dividends," which were exempt from the normal tax; or, under § 201(c) as payments made by the corporation in exchange for its stock, which were taxable "as other gains or profits."

It is true that if § 201(a) stood alone its broad definition of the term "dividend" would apparently include distributions made to stockholders in the liquidation of a

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However, if such stock was acquired prior to March 1, 1913, and the fair market value as of such date was greater than the cost but less than the amount so distributed, the taxable income is the excess over such fair market value of the amount received, but no gain is recognized if the amount received, although more than cost, is less than the fair market value of the stock on March 1, 1913." 23 Treas. Dec. Int. Rev., 763, 769.

corporation—although this term, as generally understood and used, refers to the recurrent return upon stock paid to stockholders by a going corporation in the ordinary course of business, which does not reduce their stock holdings and leaves them in a position to enjoy future returns upon the same stock. See *Lynch* v. *Hornby,* 247 U. S. 339, 344–346; and *Langstaff* v. *Lucas* (D. C.) 9 F. (2d) 691, 694.

However, when § 201(a) and § 201(c) are read together, under the long-established rule that the intention of the lawmaker is to be deduced from a view of every material part of the statute, *Kohlsaat* v. *Murphy,* 96 U. S. 153, 159, we think it clear that the general definition of a dividend in § 201(a) was not intended to apply to distributions made to stockholders in the liquidation of a corporation, but that it was intended that such distributions should be governed by § 201(c), which, dealing specifically with such liquidation, provided that the amounts distributed should "be treated as payments in exchange for stock" and that any gain realized thereby should be taxed to the stockholders "as other gains or profits." This brings the two sections into entire harmony, and gives to each its natural meaning and due effect. The Treasury Regulations correctly interpreted the Act as making § 201(a) applicable to a distribution made by a going corporation to its stockholders in the ordinary course of business, and § 201(c) applicable to a distribution made to stockholders in liquidation of the corporation. And this is in accord with the rulings of the Board of Tax Appeals. *Appeal of Greenwood,* 1 B. T. A. 291, 295; *Appeal of Chandler,* 3 B. T. A. 146, 149.

The gains realized by the stockholders from the distribution of the assets in liquidation were subject to the normal tax in like manner as if they had sold their stock to third persons. The objection that this results in double taxation of the accumulated earnings and profits is no more

available in the one case than it would have been in the other. See *Merchants' L. & T. Co.* v. *Smietanki,* 255 U. S. 509; *Goodrich* v. *Edwards,* 255 U. S. 527. When, as here, Congress has clearly expressed its intention, the statute must be sustained even though double taxation results. See *Patton* v. *Brady,* 184 U. S. 608; *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 330.

The decree is

Reversed.

PEOPLE OF SIOUX COUNTY, NEBRASKA, *v.* NATIONAL SURETY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 196. Argued January 19, 1928.—Decided February 20, 1928.

1. The liability of the surety on a bond given by a bank to secure deposits of county funds in Nebraska is not limited by § 6193, Comp. Stats. Nebraska, 1922, forbidding any county treasurer to have such funds on deposit in any bank in excess of 50% of its paid up capital stock, but extends to deposits made in violation of the statute, unless otherwise provided in the bond itself. P. 240.
2. Construction of a state statute by the highest court of the State accepted by this court, though made subsequently to the decision here under review. P. 240.
3. The attorney's fees which are directed by § 7811, Nebraska Comp. Stats., 1922, to be allowed and "taxed as part of the costs," in actions on guaranty and other specified insurance contracts, are not costs in the ordinary sense and are not taxable as costs under Rev. Stats. §§ 823, 824, in actions in federal courts, but are to be allowed in those courts by inclusion in their judgments. P. 242.
4. For the purpose of fixing a reasonable attorney's fee under the statute, regard should be had to the amount substantially involved in the action. P. 244.

16 F. (2d) 688, reversed.

CERTIORARI, 274 U. S. 729, to a judgment of the Circuit Court of Appeals which reversed in part a judgment of

the District Court against the above named surety company for the full amount of a bond given to secure deposits of county funds in a bank, later insolvent, and for an attorney's fee.

Mr. Charles S. Lobingier, with whom *Mr. Edwin D. Crites* was on the brief, for petitioner.

Mr. Edwin G. Davis, with whom *Messrs. Andrew M. Morrisey, Rush C. Clarke, James G. Mothersead,* and *R. T. York* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The respondent, a surety company, as surety, and the First National Bank of Harrison, Nebraska, a designated depository for county funds, as principal, gave their bond to Sioux County, Nebraska, the petitioner, in the sum of $30,000. The bond, required by statute, was conditioned on the payment by the bank, on the order of the county treasurer, of all sums of money deposited with it by the county. The bank became insolvent and closed its doors when the county deposits amounted to $35,395.70. The present suit was brought in the district court of Sioux County, Nebraska, to recover from the surety the amount of the bond and a reasonable attorney's fee, under Neb. Comp. Stat. (1922) § 7811, and was removed to the United States district court for diversity of citizenship.

The authorized capital of the bank was $50,000, and the defense relied upon by the surety was a provision of Neb. Comp. Stat. (1922) § 6193, which forbade the deposit of county funds by county treasurers in excess of fifty per cent. of the authorized capital of the depository. The district court gave judgment for the full amount of the bond and for an attorney's fee of $3,000. The Court of Appeals for the eighth circuit reversed the judgment, disallowing the attorney's fee and any recovery on the bond

in excess of $25,000, which was one-half of the authorized capital of the bank. *National Surety Co.* v. *Lyons,* 16 Fed. (2d) 688. This Court granted certiorari. 274 U. S. 729.

The Court of Appeals took the view that the Nebraska statute, printed in the margin,[1] as construed by the Supreme Court of Nebraska, operated to limit the liability on the statutory surety bond to one-half of the authorized capital of the depository. *Cole* v. *Myers,* 100 Neb. 480; *Blaco* v. *State,* 58 Neb. 557; *In re State Treasurer's Settlement,* 51 Neb. 116; *State ex rel. Davis* v. *People's State Bank of Anselmo,* 111 Neb. 126.

The correctness of this interpretation of the Nebraska decisions is questioned here, but all doubts on that point have been set at rest by a later decision of the state court. In *Scotts Bluff County* v. *First Nat. Bank,* 115 Neb. 273, decided since the entry of judgment below, the Supreme Court of Nebraska held that the statute does not have the effect asserted, and that within the amount of the bond a county may recover from the surety the full amount of the deposit even though it exceed fifty per cent of the authorized capital of the depository.

We accept this construction of the statute and accordingly set aside the conflicting interpretation of the court below, even though it antedated the determination by the state court. *Hines Yellow Pine Trustees* v. *Martin,* 268 U. S. 458; *Bauserman* v. *Blunt,* 147 U. S. 647. If, as the state court held, the statute is to be construed as not

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[1] Neb. Comp. Stat. (1922) § 6193, ". . . The treasurer shall not have on deposit in any bank at any time more than the maximum amount of the bond given by said bank in cases where the bank gives a guaranty bond, nor in any bank giving a personal bond more than one-half of the amount of the bond of such bank, and the amount so on deposit at any time with any such bank shall not in either case exceed fifty per cent. of the paid up capital stock of such bank. . . ."

affecting the obligation of the surety, we think it plain that the liability on the bond, *qua* contract, is not affected by the county treasurer's breach of duty. The bond contains no limitation of the amount which the treasurer may deposit. The district court was therefore right in allowing a recovery of the full amount of the bond.

In striking down so much of the judgment as allowed an attorney's fee the court below was persuaded that § 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the state court. As costs in the federal courts are regulated exclusively by R. S. §§ 823 and 824, the court concluded that other costs, authorized only by a state statute, could not be included in the judgment. *See United States* v. *Sanborn,* 135 U. S. 271, 282; *The Baltimore,* 8 Wall. 377, 388, *et seq.;* compare *Ex parte Peterson,* 253 U. S. 300, 314–319.

Both in an earlier case, *Globe Indemnity Co.* v. *Sulpho-Saline Bath Co.,* 299 Fed. 219, certiorari denied 266 U. S. 606; see also *Spring Garden Insurance Co.* v. *Amusement Syndicate Co.,* 178 Fed. 519, and in a later case, *Business Men's Assurance Co.* v. *Campbell,* 18 Fed. (2d) 223, the same court applied the Nebraska statute allowing the recovery of attorneys' fees in suits upon insurance policies. When it was argued that no other costs can be taxed in a court of the United States than those authorized by federal statute, the Court of Appeals said in the latter case (p. 224) that the objection "applies only to ordinary costs, and not to allowances for attorneys' services provided by state statutes."

State statutes allowing the recovery of attorneys' fees in special classes of actions have been upheld as constitutional by this Court, *Farmers' & Merchants' Insurance Co.* v. *Dobney,* 189 U. S. 301; *Missouri, Kansas & Texas Ry.* v. *Harris,* 234 U. S. 412; *Chicago & Northwestern Ry.* v. *Nye Schneider Fowler Co.,* 260 U. S. 35; *Fidelity Mutual*

Life Ass'n v. *Mettler,* 185 U. S. 308, and they have been given effect in suits brought in the federal courts. *Fidelity Mutual Life Ass'n* v. *Mettler, supra; Iowa Life Insurance Co.* v. *Lewis,* 187 U. S. 335; *Home Life Insurance Co.* v. *Fisher,* 188 U. S. 726; *Hartford Fire Insurance Co.* v. *Wilson & Toomer Fertilizer Co.,* 4 Fed. (2d) 835, certiorari denied 268 U. S. 704.

In these cases the local statutes were in effect treated as creating a statutory liability in which insurers, by accepting risks after their enactment, had acquiesced, and for the liability thus assumed a remedy was available in the federal as well as in the state courts. *Fidelity Mutual Life Ass'n* v. *Mettler, supra,* at 326.

The present statute, printed in the margin,[2] provides that in the cases specified the court "shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as a part of the costs." The direction that the added liability be included in the judgment as costs does no more in substance than the provision upheld and applied in the *Mettler* case, that the insurance company "shall be liable to pay . . . all reasonable attorney's fees" or the provision upheld and applied in *Home Life Insurance Co.* v. *Fisher, supra,* that the attorneys' fees should be added to the judgment.

Such doubt as there may be as to the meaning and effect of the statute arises from certain decisions of the Supreme

[2] Neb. Comp. Stat. (1922) § 7811. "In all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of life, accident, liability, sickness, guaranty, fidelity or other insurance of a similar nature, or upon any certificate issued by a fraternal beneficiary association, against any company, person or association doing business in this state, the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs, and if such cause is appealed the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings."

Court of Nebraska enforcing it in suits upon insurance contracts entered into before its enactment, in which the statute, attacked as impairing the obligation of the contract, was characterized as "remedial" or as a "costs" statute. *Nye-Schneider-Fowler Co.* v. *Bridges, Hoye & Co.*, 98 Neb. 27; *id.*, 863; *Ward* v. *Bankers Life Co.*, 99 Neb. 812; *Reed* v. *American Bonding Co.*, 102 Neb. 113. In *Nye-Schneider-Fowler Co.* v. *Bridges, Hoye & Co., supra,* the Supreme Court of Nebraska said (p. 867):

"If the question that we are considering was now presented for the first time, we would hesitate to say that this statute does not create and add to the contract a legal liability which would not exist under the contract prior to the enactment of this statute. The fact that the attorney's fee is to be taxed as costs in the case is not of itself decisive of the question."

But the question before the Nebraska court in the cases cited was not that with which we are now concerned. Whether this liability for an attorney's fee, assumed by entering into an insurance contract after the enactment of the statute providing for the liability, may be enforced in the federal courts does not depend on any nice distinctions which may be taken between the right created and the remedy given. Disregarding mere matters of form it is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts.

That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys'

docket fees and the like, allowed to counsel by R. S. §§ 823, 824.

The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R. S. §§ 823, 824. That the particular mode of enforcing the right provided by the state statute—i. e., by taxing the allowance as costs—is not available to the federal courts under R. S. §§ 823, 824 does not preclude the recovery. Since the right exists the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment. R. S. § 914. Compare *Mexican Central Ry.* v. *Pinkney,* 149 U. S. 194; *Indianapolis & St. Louis R. R.* v. *Horst,* 93 U. S. 291; *Manitowoc Malting Co.* v. *Feuchtwanger,* 196 Fed. 506; *Boatmen's Bank* v. *Trower Bros. Co.,* 181 Fed. 804.

It is said that the fee customarily allowed in Nebraska is not less than 10% of the amount involved, *O'Shea* v. *North American Hotel Co.,* 111 Neb. 582; *Wirtele* v. *Grand Lodge,* 111 Neb. 302; *Central Nebraska Millwork Co.* v. *Olson & Johnson Co.,* 111 Neb. 396, and that as directed by the statute an additional fee should be allowed here for the appeal in the Court of Appeals and to this Court. The district court, in allowing $3,000 apparently assumed that the full amount of the bond, $30,000, was involved. In a technical sense this was true, since the defendant, by its pleading put in issue the right to recover the whole amount. But in point of substance the only defense was directed to the $5,000 by which the amount of the bond exceeded one-half the bank's authorized capital. For the purpose of fixing a reasonable sum, regard should be had for the amount substantially involved. For that reason we think that the fee to be allowed in all courts should not exceed $2,000. The judgment of the Circuit Court of Appeals will be reversed and the cause

remanded with directions to reinstate so much of the district court's judgment as awarded to petitioner the amount of the bond with interest, aggregating $33,492.50; interest on that amount at the rate of 7% will be allowed from September 22, 1925, the date of the district court's judgment; and the sum of $2,000 without interest will be allowed as an attorney's fee.

Reversed.

INTERSTATE BUSSES CORPORATION *v.* BLODGETT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

No. 197. Argued January 19, 20, 1928.—Decided February 20, 1928.

1. Where an application for an interlocutory injunction under Jud. Code, § 266, has been denied by a court of three judges and the bill is dismissed by that court on final hearing, the case is reviewable by direct appeal to this court. P. 249.
2. A state tax of one cent for each mile of highway traversed in the State by any motor bus used in interstate commerce, the proceeds of which are devoted to maintenance of public highways of the State, is not repugnant to the Commerce Clause of the Constitution, when not unreasonable in amount or discriminatory against interstate commerce. P. 249.
3. Such a charge, when reasonable in itself, is not to be deemed unreasonable because other taxes are imposed by the State on the same taxpayer for the use of its highways, if he fails to show that the aggregate charge is unreasonable. P. 251.
4. In addition to other taxes common to both classes, the owners of motor buses operated in interstate commerce pay in Connecticut, a tax of one cent for each mile of state highway traversed by each vehicle, but the owners of such vehicles engaged in intrastate commerce pay instead a tax on their gross receipts, the proceeds of both taxes being devoted to maintenance of highways. *Held* that a party complaining of the mileage tax does not establish discrimination against interstate commerce by the mere difference of the

taxes, but must prove that in actual practice the tax complained of falls with disproportionate economic weight upon him. P. 251.

5. Where relief from a state tax is sought upon the ground that it is unconstitutional, and it is held valid, it may be assumed that the complaining party will pay it, and the constitutional validity of the consequences imposed by the statute in case of non-payment need not be considered. P. 252.

19 F. (2d) 256, affirmed.

APPEAL from a final decree of the District Court of three judges dismissing a bill to restrain tax officials of Connecticut from levying a tax on the appellant based on its use of the state highways for interstate transportation of passengers in motor buses.

Mr. Edward H. Kelly for appellant.

Interstate transportation by motor vehicle is singled out for the imposition of a tax of one cent a mile. On that ground alone, the statute must be held to be unconstitutional. *Guy* v. *Baltimore,* 100 U. S. 434; *Brimmer* v. *Rebman,* 138 U. S. 78; *Voight* v. *Wright,* 141 U. S. 62; *Minnesota* v. *Barber,* 136 U. S. 320; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 90; *Darnell* v. *Memphis,* 208 U. S. 113.

The provision of Part II of Chapter 254 of the Laws of 1925, directing suspension of registration of a vehicle whose owner is subject to the provisions of Part II, also effects a discrimination against interstate operators by reason of the different remedies imposed for the collection of the tax. *Chalker* v. *Birmingham,* 249 U. S. 526.

The provision for suspension of registration is invalid for the reason that it is not permissible for the mere collection of a tax, to obstruct, embarrass or impede interstate commerce. *Western Union* v. *Massachusetts,* 125 U. S. 530; *St. Louis & Southwestern R. R.* v. *Arkansas,* 235 U. S. 350; *Postal Telegraph Co.* v. *Adams,* 155 U. S. 688; *Leloup* v. *Mobile,* 127 U. S. 640; *Western Union* v.

Alabama, 132 U. S. 472; *Allen* v. *Pullman,* 191 U. S. 171; *Underwood* v. *Chamberlain,* 254 U. S. 113; *Pullman Co.* v. *Richardson,* 261 U. S. 330.

A State has no right to demand the waiver of any right or immunity guaranteed by the Constitution as a condition of itself granting a privilege, immunity or license. *Frost* v. *California,* 271 U. S. 583; *Western Union* v. *Kansas,* 216 U. S. 1.

In granting federal aid to the States in the construction of highways, Congress meant that such highways shall be open to interstate commerce. *Bush & Sons* v. *Maloy,* 267 U. S. 317. *Hendrick* v. *Maryland,* 235 U. S. 610; and *Kane* v. *New Jersey,* 242 U. S. 160, distinguished.

Messrs. Benjamin W. Alling and *S. Frederick Wetzler* were on the brief for appellees.

The tax is a charge for the privilege of using the roads of the State; and when imposed upon those using the roads in interstate commerce, does not thereby offend the Commerce Clause. *Clark* v. *Poor,* 274 U. S. 554; *Kane* v. *New Jersey,* 242 U. S. 160; *Hendrick* v. *Maryland,* 235 U. S. 610.

The Connecticut registration statute, when read in its entirety, is, in its essence, a police measure; but since there is included the imposition of fees and charges, creating a money yield, which is contemplated as exceeding the cost of administration of the law, it partakes to that limited and incidental extent of a revenue measure. There is neither duplication nor superimposition of taxes. *Opinion of the Justices,* 250 Mass. 591.

The appellant has not sustained the burden of proving in this case the essential fact that the enforcement of the act actually operates to prejudice interstate commerce. *Hendrick* v. *Maryland, supra; Interstate Busses Corp'n* v. *Holyoke St. Ry. Co.,* 273 U. S. 45.

The purpose of such legislation, now nation-wide, is to charge for the use and get reimbursement for damage, and the policy is to classify vehicles, and vary the tax, in accordance with the extent of such use and damage. *Kane* v. *New Jersey,* 81 N. J. L. 594; *Camas Stage Co.* v. *Kozer,* 104 Ore. 600; *Ex parte Schuler,* 167 Calif. 282; *Re Hoffert,* 34 S. D. 271; *State* v. *Kozer,* 242 Pac. 621; *Dohs* v. *Holm,* 152 Minn. 529; *Westfalls etc. Co.* v. *Chicago,* 280 Ill. 318; *Opinion of the Justices,* 250 Mass. 591; *Fisher Bros.* v. *Brown,* 111 Ohio St. 602; *Raymond* v. *Holm,* 206 N. W. 166; *Jasnowski* v. *Dilworth,* 191 Mich. 287.

The State may adjust its scheme of taxation to the possibilities of greater or lesser use; and may, though it is not obliged to, reduce the tax on the lesser use. *Kane* v. *New Jersey,* 242 U. S. 160.

The statute does not create an unconstitutional discrimination against interstate commerce, because of the difference in remedies for collection of the tax. *Hess* v. *Pawloski,* 274 U. S. 352; *Kane* v. *New Jersey, supra.*

There is no violation of the Commerce Clause on the ground that non-payment of the tax may result in suspension of registration of motor vehicles engaged in interstate commerce. *Kane* v. *New Jersey, supra; Hendrick* v. *Maryland, supra.*

Even though the suspension of registration provision of § 3, Part II, be regarded as violating the Commerce Clause, the rest of the statute is, nevertheless, unaffected. *Dorchy* v. *Kansas,* 264 U. S. 286.

The Connecticut statute is not invalidated as a violation of the Commerce Clause, because of the Federal Post Road and Highway Acts.

These laws do not take away from the State either its duty or its rights regarding the care and preservation of the highways. *Morris* v. *Duby,* 274 U. S. 135.

MR. JUSTICE STONE delivered the opinion of the Court.

The appellant, complainant below, is a Connecticut corporation engaged in the transportation of passengers in motor buses, exclusively in interstate commerce, between Connecticut and points in Massachusetts and Rhode Island. The present suit was brought in the district court for Connecticut to restrain appellees, tax officials of the state, from levying a tax on appellant under a Connecticut statute, Conn. Pub. Acts 1925, c. 254, on the ground that the tax is an unconstitutional burden on interstate commerce. Application to a court of three judges for an interlocutory injunction under Jud. Code § 266 was denied, 19 Fed. (2d) 256, and on final hearing the court dismissed the bill on the merits. The application for the preliminary injunction having been pressed to a determination before the court of three judges, the case is properly here on direct appeal from the final decree of that court. Jud. Code §§ 238, 266; *Smith* v. *Wilson,* 273 U. S. 388; *Clark* v. *Poor,* 274 U. S. 554.

The appellant has already complied with the general statutes of Connecticut requiring the registration of motor vehicles. Part II § 1 of the act in question imposes a tax of one cent for each mile of highway traversed by any motor vehicle used in interstate commerce "as an excise on the use of such highway." By Part II § 4 the proceeds of the tax are to be applied to the maintenance of public highways in the state.

Appellant objects to the tax as an infringement of the paramount power of Congress to regulate interstate commerce or at least as a discrimination against that commerce. It is not denied that a state may impose a registration or license fee on those using motor vehicles in the state, although engaged in interstate commerce, or that the state may impose a reasonable charge for the use of

its highways by motor vehicles so employed, *Hendrick* v. *Maryland,* 235 U. S. 610; *Kane* v. *New Jersey,* 242 U. S. 160; *Clark* v. *Poor, supra,* and there is no evidence that the tax here is in itself an unreasonable charge for the privilege. But it is said that the particular scheme of taxation adopted by Connecticut imposes this tax in addition to statutory charges already made for the use of the highways in interstate commerce, and both in purpose and in effect discriminates against appellant and in favor of those operating motor vehicles in intrastate commerce.

The state has adopted a system of financing its highway construction and maintenance under which about 80% of the cost is collected from fees for the registration of motor vehicles and for operators' licenses, from taxes on the sale of gasoline and from fines and penalties for violations of the motor vehicle laws. The balance of the cost is paid from general appropriations by the state legislature and a certain amount received under federal aid legislation. Appellant, it is conceded, pays certain taxes imposed alike on those engaged in intrastate and interstate commerce. These include a personal property tax upon its motor cars used in the state, a registration or license fee for each vehicle so used, and also, it is urged, a tax of two cents a gallon on the sale of gasoline within the state which in practice is absorbed by the consumer in the purchase price.

But no mileage tax like that imposed by Part II § 1 is levied upon those using motor vehicles in intrastate commerce. Instead, Part I, § § 2 and 3 of the act under discussion subject all companies engaged in intrastate motor bus transportation to an excise of 3% of their gross receipts less such taxes as they have paid locally on their "real and tangible personal estate." By Part I § 6 this excise is declared to be in lieu of all taxes on intangible personal property. Moreover, those who pay it are exempt

from the income tax of 2% imposed generally on corporations, including, apparently, the appellant. Conn. Gen. Stat., c. 73, as amended. It, like the mileage tax, is devoted to the maintenance of highways.

To show that the mileage tax is discriminatory appellant first points out the obvious differences between it and the gross receipts tax and, secondly, relies on an uncontradicted allegation in the bill of complaint that, apart from the mileage tax, it already contributes to the maintenance of the highways of the state in the same manner and to the same extent as others in the payment of the personal property tax, the license tax on buses and the shifted gasoline tax.

The two statutes are complementary in the sense that while both levy a tax on those engaged in carrying passengers for hire over state highways in motor vehicles, to be expended for highway maintenance, one affects only interstate and the other only intrastate commerce. Appellant plainly does not establish discrimination by showing merely that the two statutes are different in form or adopt a different measure or method of assessment, or that it is subject to three kinds of taxes while intrastate carriers are subject only to two or to one. We cannot say from a mere inspection of the statutes that the mileage tax is a substantially greater burden on appellant's interstate business than is its correlative, the gross receipts tax, on comparable intrastate businesses. To gain the relief for which it prays appellant is under the necessity of showing that in actual practice the tax of which it complains falls with disproportionate economic weight on it. *General Tank Car Corp.* v. *Day,* 270 U. S. 367; *Hendrick* v. *Maryland, supra; Interstate Busses Corp.* v. *Holyoke Street Ry.,* 273 U. S. 45, 51. The record does not show that it made any attempt to do so.

That appellant is already contributing to highway maintenance is not in itself significant, for the state does

not exceed its constitutional power by imposing more than one form of tax as a charge for the use of its highways in interstate commerce. It is for appellant to show that the aggregate charge bears no reasonable relation to the privilege granted.

It is further objected that the provision of the state statute, Part II § 3, authorizing the suspension of registration as a remedy for the nonpayment of the mileage tax, is invalid in any case, since payment of even a lawful tax may not be enforced by the exclusion of the taxpayer from interstate commerce. *Western Union Telegraph Co.* v. *Massachusetts,* 125 U. S. 530; *St. Louis & Southwestern R. R.* v. *Arkansas,* 235 U. S. 350. And it is not denied that appellees have threatened to invoke § 3 against appellant. But we need not consider here whether the principle relied on goes so far as to prevent a state from excluding from its highways a motor carrier which refuses to pay a charge for their use. Compare *Hendrick* v. *Maryland, supra; Kane* v. *New Jersey, supra; Clark* v. *Poor, supra.* Here the relief sought presupposes that the tax is unconstitutional. That point being determined against appellant we shall not assume that it will persist in its refusal to pay the tax.

Objections of less moment, which we have considered, do not require comment.

Affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* PRIESTER.

CERTIORARI TO THE COURT OF APPEALS AND THE SUPREME COURT OF ALABAMA

Nos. 183 and 189. Argued January 17, 1928.—Decided February 20, 1928.

1. Where the supreme court of a State, in denying a petition for certiorari to an intermediate appellate court, on the face of the record did not pass upon the merits, the writ of certiorari from this court is properly directed to the intermediate court. P. 258.

2. A provision in the tariff filed by a telegraph company pursuant to the Interstate Commerce Act as amended June 15, 1910, fixing a lower rate for an unrepeated message and limiting the liability of the company for mistake in its transmission to the amount received for sending it, represents the entire liability of the company for a mistake of that kind. The liability being statutory, can not be enlarged by the courts upon the ground that the mistake was due to "gross" negligence. P. 258.

21 Ala. App. 587, reversed.

CERTIORARI, 274 U. S. 727, to a judgment of the Court of Appeals of the State of Alabama affirming a recovery in an action against the Telegraph Company for damages resulting from a mistake in the transmission of a telegram. The Supreme Court of the State had declined to review the judgment of the court below, 215 Ala. 435. For earlier proceedings in the same case, see 18 Ala. App. 531; 20 *Id.* 388; 212 Ala. 271.

Mr. Francis R. Stark, with whom *Mr. Ray Rushton* was on the brief, for petitioner.

There has been no independent expression of opinion by this Court in the case of *Primrose* v. *Western Union,* 154 U. S. 1, or in any other case, to the effect that there was any magic in the term "gross" negligence that would invalidate the message contract.

This Court has consistently refused to recognize that there was any legal distinction between the different degrees of negligence, and has apparently inclined to, if not definitely adopted, the view that gross negligence is nothing but negligence with the addition of a vituperative epithet. The degree of negligence is immaterial since the Act of 1910. *Western Union* v. *Esteve Bros.,* 256 U. S. 566.

This case involves a simple error in an unrepeated message, and the applicable clause of the published tariffs is that which limited the company's liability to the amount received for sending the message. *Western Union* v *Czizek,* 264 U. S. 281.

There was no evidence that the negligence was "gross," as distinguished from simple, if that question were at all material.

If it is said that the mere error in transmission makes a *prima facie* case of simple negligence, that may be granted; but it is not gross negligence unless all negligence is gross, and unless this Court erred in its carefully considered opinion in *Postal Telegraph Co.* v. *Warren Godwin Lumber Co.*, 251 U. S. 27, and in its reversal, *per curiam*, of *Western Union* v. *Southwick*, 255 U. S. 565.

If the degree of negligence were at all material, it was fatal error to charge the jury that they might find the defendant liable if it failed to "Bestow the care and skill which the situation demanded"—i. e., if the defendant was guilty of nothing more than simple negligence.

In any event, the plaintiff could not possibly have been entitled to more than $50, the amount at which the message was valued. *Western Union* v. *Czizek*, 264 U. S. 281.

Mr. D. M. Powell for respondent.

The rules of the telegraph company relieving it from liability beyond the cost of sending the unrepeated message do not apply where the company is guilty of wilful wrong or gross negligence. *Primrose* v. *Western Union*, 154 U. S. 1; *Western Union* v. *Esteve Bros.*, 256 U. S. 569; *Milwaukee R. R. Co.* v. *Arms*, 91 U. S. 495; *Preston* v. *Prather*, 137 U. S. 608.

Gross negligence was not defined in the *Primrose* case, but we assume the Court must have had in mind the definition given in the *Arms* and *Preston* cases, *supra*. Be that as it may, the doctrine of gross negligence has been applied by both state and federal courts to cases where the facts were similar to the facts in this case. *Ex parte Priester*, 212 Ala. 273; *Strong* v. *Western Union*, 18 Idaho 389; *Postal Telegraph Co.* v. *Nichols*, 159 Fed. 647; *White* v. *Western Union*, 14 Fed. 710; *Redington* v.

Pacific Postal Telegraph Co., 107 Calif. 317; 26 R. C. L., 552, 605.

The different rates, rules and regulations for sending messages as prescribed by the company were filed with the Interstate Commerce Commission and became effective with the federal statutes. *Western Union* v. *Esteve Bros.*, 256 U. S. 569.

They were previously held to be reasonable by this Court in the case of *Primrose* v. *Western Union*, 154 U. S. 1, in the absence of wilful misconduct or gross negligence. The law declared in the *Primrose* case, is quoted with approval in *Western Union* v. *Esteve Bros.*, *supra*. A fair interpretation of this decision, as well as the other decisions of the federal courts relied on by respondent, leads to the conclusion that the classification of rates and the limitations upon the telegraph company's liability which were filed with the Interstate Commerce Commission, were accepted by the Commission subject to the interpretation placed upon them in the *Primrose* case. Being so received, these rates and rules and regulations measured the liability of the telegraph company in all cases where there was an absence of willful misconduct or gross negligence, as declared in the *Primrose* case.

The mere filing of the rates with the Interstate Commerce Commission did not give them any greater force than they had at the time of such filing and did not destroy the judicial interpretation placed upon them by this Court.

Statutes in derogation of the common law are to be strictly construed. 25 R. C. L., 1056. The judicial construction of the regulation in the *Primrose* case was embodied in and became a part of the statute enacted June 18, 1910.

In *Western Union* v. *Czizek*, 286 Fed. 478, the United States Circuit Court of Appeals held the telegraph com-

pany under the facts was guilty of gross negligence. This Court held under the facts that it was not guilty of gross negligence and was therefore protected by the rules and regulations. No other question was decided. This case is not in point. The other expressions in the opinion relied on by petitioner were *dicta*.

From the very language of the statute, where the rules and regulations are unreasonable, they are, of course, not binding.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent delivered to petitioner a message for transmission over its telegraph lines from a point in Alabama to a point in Louisiana by which respondent offered to sell to the addressee a quantity of pecans at fifty cents per pound. In the message as transmitted the word "fifteen" was substituted for the word "fifty." Respondent, who in consequence of the error suffered damage in the sum of $352.10, brought suit in the Circuit Court of Butler County, Alabama, to recover for petitioner's negligence in failing to transmit the message as given. The company pleaded that (a) as the message was not a repeated message its liability was limited to the amount received for sending it, by the terms of the tariffs and classifications filed with the Interstate Commerce Commission under Act of June 18, 1910, c. 309, 36 Stat. 539 § 1, and (b) as the message was not sent as a specially valued message the liability of the company was limited to $50 by the filed tariffs and classifications. Relevant parts of the tariff are printed in the margin.[1]

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[1] "ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS.

"To guard against mistakes or delays, the sender of a message should order it repeated, that is telegraphed back to the originating office for comparison. For this one-half the unrepeated message rate

These defenses were overruled and judgment given for the plaintiff, the respondent here, which was reversed by the state Court of Appeals, 18 Ala. App. 531, on the authority of *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566. Upon an amended complaint charging gross negligence a trial was had resulting in a verdict and judgment for the plaintiff for nominal damages, which was affirmed by the Court of Appeals on the ground that the evidence did not establish gross negligence and that the trial court had rightly withdrawn that question from the jury. 20 Ala. App. 388. The Supreme Court of Alabama reversed the judgment of the Court of Appeals, ruling that although the filed tariff was a bar to the recovery of damages resulting from negligence, as decided in the *Esteve* case, it did not preclude a recovery for gross negligence and that on the evidence the jury should have been allowed to say whether the negli-

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is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED MESSAGE AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the message and the Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of an unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages.

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for non-delivery of this message, whether caused by the negligence of its servants or otherwise, beyond the sum of Fifty Dollars, at which amount this message is hereby valued, unless a greater value is stated in writing hereon at the time the message is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof."

gence of the defendant was gross. *Ex parte Priester,* 212 Ala. 271. On a retrial, judgment was again given for the plaintiff for the full amount demanded. This was affirmed by the Court of Appeals which, following the previous opinion of the state Supreme Court, held that the tariff was not a defense to an action for damages resulting from gross negligence. 21 Ala. App. 587. The state Supreme Court denied certiorari, 215 Ala. 435. This Court granted certiorari. Jud. Code, 237 (b); 274 U. S. 727.

Through abundance of caution petitioner filed separate petitions here, which were granted, asking that writs of certiorari be directed respectively to the Court of Appeals and to the Supreme Court. But as the Supreme Court of Alabama, by denying the petition for certiorari, on the face of the record did not pass on the merits, the writ of this Court in number 183 was properly directed to the Court of Appeals, and that in number 189 is dismissed. *Norfolk Turnpike Co.* v. *Virginia,* 225 U. S. 264, 269; *Western Union Telegraph Co.* v. *Crovo,* 220 U. S. 364; compare *Matthews* v. *Huwe,* 269 U. S. 262.

In *Primrose* v. *Western Union Telegraph Co.,* 154 U. S. 1, relied upon by the Supreme Court of Alabama in the earlier appeal as supporting its distinction between ordinary negligence and gross negligence, a contract between the telegraph company and its patron, limiting the liability of the company if the message was not repeated, was upheld as a defense to an action seeking recovery for the negligent transmission of the message. Although it is suggested in the opinion (pp. 17–19) that as a matter of public policy the company would not have been permitted to stipulate away its liability for gross negligence, the distinction was neither involved in the case nor applied by the Court, nor has it been so applied. See *Philadelphia & Reading R. R.* v. *Derby,* 14 How. 468, 485, 486;

Steamboat New World v. *King,* 16 How. 469, 474; *Milwaukee & St. Paul Ry.* v. *Arms,* 91 U. S. 489, 493–495.

Since the decision in the *Primrose* case the telegraph companies have been brought under the provisions of the Interstate Commerce Act and their tariffs for all interstate service made subject to the approval of the Interstate Commerce Commission. Interstate Commerce Act § 1, as amended by Act of June 18, 1910, c. 309, § 7, 36 Stat. 539. By § 1 of the Interstate Commerce Act it is provided that subject to the approval of the Commission messages received by telegraph companies for transmission may be classified into "repeated, unrepeated . . . and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages." The established rates for unrepeated messages thus became the lawful rates and the attendant limitation of liability became the lawful condition upon which messages might be sent. *Unrepeated Message Case,* 44 I. C. C. 670; *Western Union Telegraph Co.* v. *Esteve Bros. & Co., supra,* 571; *Postal Telegraph-Cable Co.* v. *Warren-Godwin Co.,* 251 U. S. 27; *Western Union Telegraph Co.* v. *Boegli,* 251 U. S. 315; *Western Union Telegraph Co.* v. *Czizek,* 264 U. S. 281. What had previously been a matter of common law liability, with such contractual restrictions as the states might permit, then became the subject of federal legislation to secure reasonable and just rates for all without undue preference or advantage to any. Since that end is attainable only by adherence to the approved rate, based upon an authorized classification, that rate "represents the whole duty and the whole liability of the company." *Western Union Telegraph Co.* v. *Esteve Bros. & Co., supra.* Such being the basis of liability, we do not perceive any adequate ground upon which it may be enlarged merely by the application of a "vituperative epithet" to the admitted

fault of the petitioner. *Milwaukee & St. Paul Ry.* v. *Arms, supra,* 494. For if it be assumed that we can weigh and measure degrees of negligence and that a public service company may not by contract alone limit its liability for gross negligence, so-called, nevertheless we may not disregard a lawful exercise of the regulatory power which has made no distinction between degrees of negligence, nor may we, upon any theory of public policy, annex to the rate as made conditions affecting its uniformity and equality.

The message here was unrepeated and the loss resulted from a mistake in transmission. The case thus comes within the express provision of clause 1 of the tariff, limiting the liability to the amount received for the service.

The cause will be reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed.

SALTONSTALL ET AL. *v.* SALTONSTALL ET AL., TRUSTEES.

ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 144. Argued January 5, 6, 1928.—Decided February 20, 1928.

1. A decision of a state court applying a state statute over the ambiguous objection that it is "unconstitutional" is reviewable here in so far as that court interpreted the objection as based on the Federal Constitution, and, in its opinion, sustained the statute under that instrument. P. 267.
2. By Massachusetts Acts of 1909, c. 527, § 8, a transfer of property passing to anyone through the failure of any person to exercise a power of appointment, is made taxable under an Act of 1907, which as amended, 1916, taxes property passing by gift made or intended to take effect in possession or enjoyment after the death of the donor. A trust, established before the dates of these acts, when interests passing to children were not subject to transfer tax, gave

the income, after the settlor's death, to his children (with gifts over), but reserved to him while living the power, with consent of one trustee, to alter or terminate the trust. The settlor having died while these acts were in force, without having exercised the power, the entire interest passing to the children was held taxable as of the date of his decease. *Held:*

(1) That the state court's construction of the taxing Acts as imposing a succession tax, and of the trust instrument as creating a power of appointment within the Act of 1909, would be accepted by this Court. P. 269.

(2) Imposition of the tax under the statute of 1909 was consistent with the due process clause of the Fourteenth Amendment, the tax being laid, not on the donor, but on the beneficiaries, the gifts taxed having never passed to them until after the donor's death subsequent to the enactment of the statute, and the basis of the tax being the value of the gifts at that operative moment. *Nichols* v. *Coolidge*, 274 U. S. 531, distinguished. P. 270.

(3) So long as the privilege of succession has not been fully exercised, it may be reached by a tax. P. 271.

256 Mass. 519, affirmed.

ERROR to a judgment of the Supreme Judicial Court of Massachusetts instructing trustees that interests of beneficiaries under a trust were subject to succession taxes. The beneficiaries, having prayed a contrary ruling in answer to the trustees' petition, sued out this writ of error against their co-respondent, James Jackson, Treasurer and Receiver General of the State, and the trustees. The opinion below is reported *sub nom. Saltonstall* v. *Treasurer & Receiver General.*

Mr. Thomas Hunt for plaintiffs in error.

A tax which retroactively imposes a burden upon rights already vested, as this one does, is not a reasonable form of excise, but an arbitrary one. A "vested" interest in remainder is one which is always ready, from its beginning to its end, to come into possession the moment the prior estates may determine. *Brown* v. *Lawrence*, 3 Cush. 390.

These life interests were "vested" interests, which had passed to the beneficiaries, and vested in them immediately upon the delivery of the trust deed and the trust property. *Welch* v. *Treasurer,* 217 Mass. 348.

Besides, it is to be remembered that, by the amendment of October 24, 1919, Peter C. Brooks' rights in the income were terminated, finally and completely. There was no right or interest whatever left to pass to the beneficiaries upon his death.

All the conveyances took place prior to September 1, 1907, the date when the first tax on direct inheritances became effective. Long before that date these Trustees and these respondents had present vested rights to receive certain property upon the death of certain persons. These taxing acts, as construed by the Massachusetts courts, now deprive them of their right to receive some of that property, namely, the amount held to be payable as a tax. They are deprived of that right on the ground that the State can impose an excise tax for its aid and sanction in making such a transfer valid. See *Keeney* v. *New York,* 222 U. S. 525. But if that aid had already been freely given, without being subject to an excise, or any other tax, at the time when the grantor and grantees, relying upon the law as it then existed, entered into the transaction, for the legislature years afterward to attempt retroactively to exact an excise for this "commodity" seems as unreasonable (and, therefore, as unconstitutional) as the action of the Florida Legislature in the case of *Forbes Power Boat Line* v. *Board of Commissioners,* 258 U. S. 338. The weight of authority is clear to that effect. *Matter of Pell,* 171 N. Y. 48; *Matter of Lyon,* 233 N. Y. 208; *Matter of Seaman,* 147 N. Y. 69; *Matter of Lansing,* 182 N. Y. 238; *Houston's Estate,* 276 Pa. 330; *Hunt* v. *Wicht,* 174 Cal. 205; *Commonwealth* v. *Wellford,* 114 Va. 372; *Commonwealth*

v. *McCauley's Executor,* 166 Ky. 450; *State* v. *Probate Court,* 102 Minn. 268; *Miller* v. *McLaughlin,* 141 Mich. 425.

It is open to this Court to say that the purpose of this legislation was not sufficiently different from that of the taxing act under consideration in *Levy* v. *Wardell,* 258 U. S. 542, to make the reasoning of the latter case inapplicable.

In *Nichols* v. *Coolidge,* 274 U. S. 531, the statute which, in *Levy* v. *Wardell, supra,* had been open to two constructions, had been made, by amendment, definitely retroactive (Act of February 24, 1919, § 402 (c)), and this Court, consistently with its former opinion, held it unconstitutional.

It is submitted that *Blodgett* v. *Holden,* 275 U. S. 142, taken in connection with *Nichols* v. *Coolidge, supra,* is conclusive of the present case.

Even if, by doing violence to the language of the statute (which says—"All property . . . which shall pass . . . by deed, grant or gift . . . shall be subject to a tax"), it can be held that the tax is not on property, but on that shadowy conception "the vesting of the property in possession and enjoyment," called a "commodity," still the tax cannot be supported as an excise, for two reasons:

(1) It would be the same sort of proceeding which was held unreasonable in *Frick* v. *Pennsylvania,* 268 U. S. 473, and in *Nichols* v. *Coolidge, supra,*—because "it would open the way for easily doing indirectly what is forbidden to be done directly."

(2) The definitions of the term "excise," which are collected in *Patton* v. *Brady,* 148 U. S. 608, are all similar to Blackstone's, there quoted, which is, "An inland imposition, paid sometimes upon the consumption of the commodity . . ."

The beneficiaries acquired, when the original transfers were made, the right not only to the property, but also to immediate possession and enjoyment upon the death of Mr. Brooks; and, after that, the only thing left for the State to tax was the actual use and enjoyment of their own property—of what already belonged to them. Such a tax would be, like the tax upon the income from property,—a direct tax on the property itself. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; *Houston's Estate,* 276 Pa. 330.

The State cannot, under the guise of an excise, exact a tax for the mere physical possession or enjoyment of one's own property when this is nothing but the exercise of a right which the State had already given long before. *Frew* v. *Bowers,* 12 F. (2d) 625.

One person cannot, by a will or a deed, transfer "enjoyment" or "possession" to another. Deeds and wills deal with, and "pass" and convey, rights—legal rights, not physical conditions.

The Massachusetts court itself has held that this excise is a tax, not on "possession" or "enjoyment," or "coming into possession and enjoyment," but upon the right to receive property, "the privilege of passing title." *Walker* v. *Treasurer and Receiver General,* 221 Mass. 600; *Pratt* v. *Dean,* 246 Mass. 300; *Dexter* v. *Treasurer,* 243 Mass. 523; *Attorney General* v. *Barney,* 211 Mass. 134.

In any event, Massachusetts has no right or power to impose the tax, because it is not the State from which is derived the privilege by virtue of which this property, or an interest in this property, was acquired.

These taxing acts and taxes deny to the plaintiffs in error the equal protection of the laws. *Southern Ry.* v. *Greene,* 216 U. S. 400; *Matter of Pell,* 171 N. Y. 48. They impair the obligation of a contract within the meaning of Art. I, § 10 of the Constitution.

Mr. Edwin H. Abbott, Jr., with whom *Mr. Arthur K. Reading*, Attorney General of Massachusetts, was on the brief, for the Treasurer and Receiver General.

The record presents no federal question sufficient to give this Court appellate jurisdiction. *Harding* v. *Illinois*, 196 U. S. 78; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291; *Home for Incurables* v. *City of New York*, 187 U. S. 155; *Erie R. R.* v. *Purdy*, 185 U. S. 148.

This Court accepts the construction placed upon these statutes by the court below. *Chanler* v. *Kelsey*, 205 U. S. 466; *Stebbins* v. *Riley*, 268 U. S. 137. It will therefore accept the decision of that court that these statutes impose an excise upon the privilege of succession, and that such privilege of succession is not fully exercised until the gift takes effect in possession and enjoyment. *Crocker* v. *Shaw*, 174 Mass. 266; *Attorney General* v. *Stone*, 209 Mass. 186; *Burnham* v. *Treasurer & Receiver General*, 212 Mass. 165; *Attorney General* v. *Clark*, 222 Mass. 291; *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471; *Pratt* v. *Dean*, 246 Mass. 300; *Magee* v. *Treasurer & Receiver General*, 256 Mass. 512.

This Court also accepts and is bound by the construction placed by the court below upon the deed of trust. *Nickel* v. *Cole*, 256 U. S. 222; *Enterprise Irrigation Dist.* v. *Canal Co.*, 243 U. S. 157.

It is therefore not open to question here that the interests of plaintiffs in error took effect in possession and enjoyment at Mr. Brooks' death on January 27, 1920, within the meaning of St. 1916, c. 268, § 1. Even if that question were open, it is settled adversely to plaintiffs in error. *New England Trust Co.* v. *Abbott*, 205 Mass. 279; *State Street Trust Co.* v. *Treasurer & Receiver General*, 209 Mass. 373; *Pratt* v. *Dean*, 246 Mass. 300. *Welch* v. *Treasurer & Receiver General*, 217 Mass. 348, distinguished.

It is also not open to question that the trust deed confers a power of appointment, or that the partial failure to exercise it contributed to the taking in possession and enjoyment, and so constituted a taxable disposition. *Minot* v. *Treasurer, etc.*, 207 Mass. 588; *Burnham* v. *Treasurer, etc.*, 212 Mass. 165; *Lines Estate*, 155 Pa. St. 378; *Manning* v. *Board of Comm'rs*, 46 R. I. 400. See also *Bullen* v. *Wisconsin*, 240 U. S. 625.

It is settled that a State may impose an excise upon the privilege of the donee to succeed to the property in possession and enjoyment upon the death of the grantor, as well as upon the privilege of the grantor so to transfer it. *Stebbins* v. *Riley*, 268 U. S. 137.

Moreover, the privilege of succession may be exercised in respect to a gift by deed as well as in respect to a gift by will. Hence a statute which imposes an excise upon the privilege of succession before that privilege is fully exercised by taking in enjoyment, does not impair the obligation of contract, whether the succession takes place by will or by deed. *Carpenter* v. *Penna.*, 17 How. 456; *Orr* v. *Gilman*, 183 U. S. 278; *Chanler* v. *Kelsey*, 205 U. S. 466; *Moffitt* v. *Kelly*, 218 U. S. 400; *Nickel* v. *Cole*, 256 U. S. 222. See also, *Corry* v. *Mayor etc. of Baltimore*, 196 U. S. 466.

So also a statute imposing a succession tax, which is passed before the privilege of succession is fully exercised by taking in enjoyment at the grantor's death, does not take the donee's property without due process of law or deny to the donee the equal protection of the laws, contrary to the Fourteenth Amendment. *Orr* v. *Gilman*, 183 U. S. 278; *Cahen* v. *Brewster*, 203 U. S. 543; *Chanler* v. *Kelsey*, 205 U. S. 466; *Moffitt* v. *Kelly*, 218 U. S. 400; *Nickel* v. *Cole*, 256 U. S. 222; *Wachovia Bank* v. *Doughton*, 272 U. S. 568; *Crocker* v. *Shaw*, 174 Mass. 266; *Minot* v. *Treasurer etc.*, 207 Mass. 588; *Attorney General* v.

Stone, 209 Mass. 186; *Burnham* v. *Treasurer etc.,* 212 Mass. 165; *Magee* v. *Treasurer etc.,* 256 Mass. 512; *Congregational Home Society* v. *Bugbee,* 101 N. J. L. 214; *American Bd. of Comm'rs* v. *Bugbee,* 98 N. J. L. 84; *State* v. *District Court,* 70 Mont. 322; *In re Short's Estate,* 16 Pa. St. 63; *Manning* v. *Bd. of Tax Comm'rs,* 46 R. I. 400.

The principle that an excise may be imposed upon the privilege of succession at any time before that privilege is fully exercised, extends to and embraces cases where the excise is imposed by an act passed after the interest has vested in law, but before it has taken effect in possession and enjoyment. Cases last cited and *Carpenter* v. *Pennsylvania,* 17 How. 456; *Nichols* v. *Coolidge,* 274 U. S. 531; *Matter of Pell,* 171 N. Y. 48. *Schlesinger* v. *Wisconsin,* 270 U. S. 230, distinguished.

Mr. Justice Stone delivered the opinion of the Court.

Plaintiffs in error are beneficiaries of a trust created by deed of Peter C. Brooks. After the death of the settlor the trustees, who, with certain Massachusetts tax officials, are defendants in error, filed in the Supreme Judicial Court of Massachusetts a petition for instructions which joined the beneficiaries of the trust and the officials as respondents, and asked a determination that the Massachusetts statutes taxing inheritances did not affect the property passing to the beneficiaries under the trust, or, if applicable, were "unconstitutional." The beneficiaries joined in the prayer of the bill and it was opposed by the state officials. The Supreme Judicial Court held the taxing acts applicable and valid. We may disregard the ambiguity of the trustees' contention below that the statutes were "unconstitutional," in so far as the state court understood that the federal Constitution was the basis for the objection and in its opinion sustained the statutes under that instrument. *Cissna* v. *Tennessee,* 246 U. S.

289; compare *Miedreich* v. *Lauenstein*, 232 U.S. 236. To that extent the case is properly here on writ of error. Jud. Code § 237(a).

In brief and argument here plaintiffs in error have stated various constitutional objections to the taxing acts. But as on the record none of them before the Supreme Judicial Court appear to have been based on the federal Constitution, we consider only the single objection discussed as a federal question by that court in its opinion, viz., that the statutes as applied deprive plaintiffs in error of their property without due process of law because retroactive as to them.

On various dates between 1905 and 1907, Peter C. Brooks by indenture transferred to the trustees, defendants in error, or their predecessors, certain property upon trust, to pay the income to him for life or, at his option, to allow it to accumulate, and upon the death of himself and his wife to pay the income to his children, the plaintiffs in error, without any liability for their debts and without power of alienation or anticipation; with gifts over.

The trust instrument provided that its terms might be changed and the trust terminated in whole or in part by Peter C. Brooks, with the concurrence of one trustee. Before his death, on January 27, 1920, the trust was in fact thrice altered, the last time in 1919 by providing that during the life of Peter C. Brooks the income should be accumulated and added to the principal, so that from that date his interest in the trust was terminated, except for the power with one trustee to alter or terminate it.

At the time of the several transfers there were no Massachusetts statutes imposing an inheritance or transfer tax upon property passing to children, but before the death of Peter C. Brooks the statutes now assailed were enacted. By Mass. Acts 1909, c. 527, § 8, printed in the

margin,[1] the transfer of property passing to anyone on the exercise of a power of appointment or the failure to exercise it is made taxable as though a disposition or transfer of property taxable under the provisions of the statute taxing inheritances, Mass. Acts 1907, c. 563.

Mass. Acts 1916, c. 268, § 1, amending Mass. Acts 1907, c. 563, § 1, as amended, imposes a tax on all property passing by will, intestate succession, or gift "made or intended to take effect in possession or enjoyment after the death of the grantor or donor." By § 4 of this act the tax is made applicable only to property or interests therein "passing or accruing upon the death of persons who die subsequently to the passage hereof."

In this and earlier cases the Massachusetts court has held that the tax authorized by these statutes is a tax upon "succession" which includes the "privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of property." See *Attorney General* v. *Stone,* 209 Mass. 186, 190; *Minot* v. *Winthrop,* 162 Mass. 113, 124; *Crocker* v. *Shaw,* 174 Mass. 266, 267. It has held

[1] "Section 8. Whenever any person shall exercise a power of appointment derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed to be a disposition of property by the person exercising such power, taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure . . . ."

also that the provisions of the trust instrument for change or termination of the trust by Peter C. Brooks with the consent of one trustee created a power of appointment within the meaning of Mass. Acts 1909, c. 527, § 8, and that the nonexercise of the reserved power in Brooks' lifetime as well as the fact that the interest of the beneficiaries took effect "in possession or enjoyment" after his death within the meaning of Mass. Acts 1916, c. 268, § 1, required the imposition of the tax as of the date of his death upon the entire interest in the trust passing to the plaintiffs in error. This construction of the statutes by the state court we accept, *Stebbins* v. *Riley,* 268 U. S. 137; *Chanler* v. *Kelsey,* 205 U. S. 466, 477, as we do its construction of the trust deed. *Nickel* v. *Cole,* 256 U. S. 222, 225; *Moffitt* v. *Kelly,* 218 U. S. 400.

The plaintiffs in error contend that as interpreted the statutes deprive them of property without due process because they are taxed on an interest they had already received before the enactment of the taxing acts. It is said that they had vested interests or remainders subject only to being divested by the exercise of the reserved power, which never happened; that as their remainders vested before the enactment of the taxing statutes these cannot constitutionally be applied to them under the rule laid down by this Court in *Nichols* v. *Coolidge,* 274 U. S. 531.

In *Nichols* v. *Coolidge* it was held that under the estate tax sections of the Revenue Act of 1919—which tax the privilege of transmission, *Nichols* v. *Coolidge, supra; New York Trust Co.* v. *Eisner,* 256 U. S. 345—property of which a donor had made an outright conveyance several years before the enactment of the statute could not, on his death after its enactment, be included as part of his taxable gross estate at its value at the time of his death. But we are here concerned, not with a tax on the privilege of

transmission, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of, and to do so at the probably appreciated value which the gift now bears, but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the state whether occasioned by death, *Stebbins* v. *Riley, supra,* or effected by deed, *Keeney* v. *New York,* 222 U. S. 525; *Chanler* v. *Kelsey, supra; Nickel* v. *Cole, supra.* The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor; and the value of the gift at that operative moment, rather than at some later date, is the basis of the tax.

So long as the privilege of succession has not been fully exercised it may be reached by the tax. See *Cahen* v. *Brewster,* 203 U. S. 543; *Orr* v. *Gilman,* 183 U. S. 278; *Chanler* v. *Kelsey, supra; Moffitt* v. *Kelly, supra; Nickel* v. *Cole, supra.* And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. *Bullen* v. *Wisconsin,* 240 U. S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another. And so the property passing to the beneficiaries here was acquired only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance.

Without considering the other statutes involved, we need not go further than to say that the statute of 1909,

imposing the tax because of the failure to exercise the power of appointment, does not deprive plaintiffs in error of their property without due process of law.

Affirmed.

MILLER ET AL. *v.* SCHOENE.

ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 199. Argued January 20, 1928.—Decided February 20, 1928.

1. An Act of Virginia provides, compulsorily, for the cutting down of red cedar trees within two miles of any apple orchard when found upon official investigation to be the source or "host plant" of the communicable plant disease called cedar rust and to "constitute a menace to the health of any apple orchard in said locality" The owner is allowed a judicial review of the order of the State Entomologist directing such cutting, and may use the trees when cut, but no compensation is allowed him for their value standing or for decrease in market value of the realty caused by their destruction. The evidence shows that the life cycle of the parasite has two phases, passed alternately on the cedar and the apple; that it is without effect on the value of the cedar, but destructive of the leaves and fruit of the apple; that it is communicable by spores from the cedar to the apple over a radius of at least two miles; that the only practicable method of controlling it is destruction of all red cedar trees within that distance of apple orchards; and that the economic value of cedars in Virginia is small as compared with that of the apple orchards.

   Held, that the Act is consistent with the Due Process Clause of the Fourteenth Amendment. P. 277.

2. When forced to make the choice, the State does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. P. 279.

3. Preferment of the public interest, even to the extent of destroying property interests of the individual, is one of the distinguishing characteristics of every exercise of the police power which affects property. P. 280.

4. The provision of the statute that the investigation of the locality shall be made upon the request of ten or more reputable freeholders of the county or magisterial district does not make it objectionable as subjecting private property to arbitrary or irresponsible action of private citizens, since the decision whether the facts revealed bring the case within the statute is made by the State Entomologist and subject to judicial review. *Eubank* v. *Richmond,* 226 U. S. 137, distinguished. P. 280.
5. Since no penalty can be incurred or disadvantage suffered under the statute in advance of the judicial ascertainment of its applicability, and since it was held applicable in this case by the state court, the objection to its vagueness is without weight. P. 281.

146 Va. 175, affirmed.

ERROR to a judgment of the Supreme Court of Appeals of Virginia, which affirmed a judgment affirming on appeal an order of the State Entomologist, Schoene, requiring the plaintiffs to cut down a large number of ornamental red cedar trees growing on their property. The judgment allowed them $100 to cover the expense of removing the cedars.

Mr. Randolph Harrison, with whom *Messrs. C. W. Bennick* and *D. O. Dechert* were on the brief, for plaintiffs in error.

The statute is invalid in that it provides for the taking of private property, not for public use, but for the benefit of other private persons. *Buchanan* v *Worley,* 245 U. S. 74.

The enforcement of this law against plaintiffs in error, involving the destruction of all the red cedar trees on their land, would result in the taking of property values of considerable magnitude—not less than five to seven thousand dollars as they offered to prove.

We submit that the case is in no wise controlled by the decisions cited in *Bowman* v. *Entomologist,* 128 Va. 351, in which statutes have been held valid which pro-

vided for the destruction, as nuisances, of noxious weeds (never of any value for any purpose); or of fruit trees infected with San José scale; or of peach trees affected by the "yellows"; or of apple trees infected with fruit scab, or of oranges affected by "citrus canker,"—in all of which instances the disease was one so affecting the trees to be destroyed that their value as property was utterly annihilated, and whose destruction, therefore, in order to preserve healthy trees, could in no proper sense be regarded as a taking of property. Such trees, so diseased, become of course, from the standpoint of value, of the same class as noxious weeds, and within the *de minimis* doctrine.

But in the case at bar, the cedar trees are not themselves injured in the slightest degree as a result of their becoming hosts of the cedar rust. Nor is their contribution to the market value of the land on which they grow at all diminished thereby.

It seems a wholly untenable view that of two species of valuable property, one may be selected for destruction for the protection of the other from the effects of a disease for whose existence and continuance they are interchangeably responsible.

In no case can property be taken for private use; and the taking of private property for *public* use without due process of law and proper compensation cannot be justified under the guise of the exercise of the police power. *Lochner* v. *New York,* 198 U. S. 45; *Dobbins* v. *Los Angeles,* 195 U. S. 233; *Mehlos* v. *Milwaukee* (Wis.), 146 N. W. 884; *Penna. Coal Co.* v. *Mahon,* 260 U. S. 393.

Neither the public health, the public safety, nor the public morals or general welfare will be benefited or promoted in any degree by the statute in question. The alleged injury to the apple orchardist "will not justify his shifting the damage to his neighbor's shoulders." *Penna. Coal Co.* v. *Mahon,* 260 U. S. 393.

We submit that there is not, in the American theory of government, any room for the view that one man's property may be taken or destroyed, either directly by eminent domain or indirectly, under the guise of taxation, or of the police power, in order to enhance the property values or the financial prosperity of another. The statute prescribes no means whereby the relative proportions or values of the growths of cedar trees to be destroyed in a particular case, and of the growths of the apple trees sought to be protected thereby, shall be measured. It is not even required that the entomologist or the court shall be of the opinion that the orchards for whose benefit the destruction of the cedar owner's property is required, as compared with the cedars, are of any considerable value; that they shall be sufficient in extent or value to be deemed commercially important; or that, in any way, they shall be shown capable of any material contribution to the general prosperity of the State or of the community in which they exist—even indirectly by adding to the values of its industries or contributing to its aggregate wealth.

If it be assumed that the orchard industry of the section at large from which the case comes is one of considerable profit, that profit redounds to the benefit, not of the State or any of its political sub-divisions nor of any public activity, but of the private owners of the orchards. If it can be said that their prosperity is a part of the general prosperity, the same is true of every profit gaining enterprise in which citizens engage, and if the police power extends to the promotion of the welfare of orchard owners, by means of the taking or destruction of valuable private property, it would seem clear that any of the other industrial or profit-making enterprises of a portion of the people may be likewise so promoted. Upon such a view the property destroying capacity of the "police power" would be absolutely limitless, and the constitu-

tional protection of property rights but hollow mockery. *Kaukauna etc. Co.* v. *Green Bay Co.*, 142 U. S. 273; *Ambler Realty Co.* v. *Village of Euclid*, 297 Fed. 307.

Control of property of plaintiffs in error is exercised under the statute by other owners of property. *Eubank* v. *Richmond*, 226 U. S. 137; *Fortune* v. *Braswell* (*Ga.*), 77 S. E. 819; *Cleveland Ry Co.* v. *People* (*Ill.*), 72 N. E. 725; *Noel* v. *People* (*Ill.*), 58 N. E. 616; *Railway Co.* v. *Todd* (*Ky.*), 5 S. W. 56; *Morton* v. *Holes* (*N. D.*), 115 N. W. 256; *Kelleher* v. *Schoene*, 14 F. (2d) 341.

The Virginia Court has itself declared, in *Bowman* v. *Entomologist*, 128 Va. 351, that the red cedar trees denounced by the Cedar Rust statute are not nuisances at common law.

The statute is void for vagueness and uncertainty. It contains no criterion whatever by which to determine who are the freeholders of the locality to whom is confided the power of invoking the axe of the Entomologist. Again, what is the "locality" intended by the statute? No technical meaning attaches to the term. *Connally* v. *General Construction Co.*, 269 U. S. 383.

The Virginia Court, in its opinion, has placed two interpretations on the term "locality" so opposed to each other, that it would seem that the matter is still open for determination by this Court.

But if it be held that the term "locality" is sufficiently definite, what is to be said of the term "orchard," or "orchards." How many apple trees must be grouped together to constitute an "orchard"?

The statute, as construed is plainly contrary to the first clause of the Fourteenth Amendment, *Chicago etc., R. R.* v. *Illinois*, 200 U. S. 592; *Pierce et al.* v. *The Society of Sisters*, 268 U. S. 510.

Mr. F. S. Tavenner, with whom *Mr. John R. Saunders*, *Attorney General of Virginia*, was on the brief, for defendant in error.

MR. JUSTICE STONE delivered the opinion of the Court.

Acting under the Cedar Rust Act of Virginia, Va. Acts 1914, c. 36, as amended by Va. Acts 1920, c. 260, now embodied in Va. Code (1924) as §§ 885 to 893, defendant in error, the state entomologist, ordered the plaintiffs in error to cut down a large number of ornamental red cedar trees growing on their property, as a means of preventing the communication of a rust or plant disease with which they were infected to the apple orchards in the vicinity. The plaintiffs in error appealed from the order to the Circuit Court of Shenandoah county which, after a hearing and a consideration of evidence, affirmed the order and allowed to plaintiffs in error $100 to cover the expense of removal of the cedars. Neither the judgment of the court nor the statute as interpreted allows compensation for the value of the standing cedars or the decrease in the market value of the realty caused by their destruction whether considered as ornamental trees or otherwise. But they save to plaintiffs in error the privilege of using the trees when felled. On appeal the Supreme Court of Appeals of Virginia affirmed the judgment. *Miller* v. *State Entomologist,* 146 Va. 175. Both in the Circuit Court and the Supreme Court of Appeals plaintiffs in error challenged the constitutionality of the statute under the due process clause of the Fourteenth Amendment and the case is properly here on writ of error. Jud. Code § 237(a).

The Virginia statute presents a comprehensive scheme for the condemnation and destruction of red cedar trees infected by cedar rust. By § 1 it is declared to be unlawful for any person to "own, plant or keep alive and standing" on his premises any red cedar tree which is or may be the source or "host plant" of the communicable plant disease known as cedar rust, and any such tree growing within a certain radius of any apple orchard is declared to be a public nuisance, subject to destruction. Section 2 makes it the duty of the state entomologist, "upon the

request in writing of ten or more reputable free-holders of any county or magisterial district, to make a preliminary investigation of the locality . . . to ascertain if any cedar tree or trees . . . are the source of, harbor or constitute the host plant for the said disease . . . and constitute a menace to the health of any apple orchard in said locality, and that said cedar tree or trees exist within a radius of two miles of an apple orchard in said locality." If affirmative findings are so made, he is required to direct the owner in writing to destroy the trees and, in his notice, to furnish a statement of the "fact found to exist whereby it is deemed necessary or proper to destroy" the trees and to call attention to the law under which it is proposed to destroy them. Section 5 authorizes the state entomologist to destroy the trees if the owner, after being notified, fails to do so. Section 7 furnishes a mode of appealing from the order of the entomologist to the circuit court of the county, which is authorized to "hear the objections" and "pass upon all questions involved," the procedure followed in the present case.

As shown by the evidence and as recognized in other cases involving the validity of this statute, *Bowman* v. *Virginia State Entomologist,* 128 Va. 351; *Kelleher* v. *Schoene,* 14 Fed. (2d) 341, cedar rust is an infectious plant disease in the form of a fungoid organism which is destructive of the fruit and foliage of the apple, but without effect on the value of the cedar. Its life cycle has two phases which are passed alternately as a growth on red cedar and on apple trees. It is communicated by spores from one to the other over a radius of at least two miles. It appears not to be communicable between trees of the same species but only from one species to the other, and other plants seem not to be appreciably affected by it. The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruc-

tion of all red cedar trees, subject to the infection, located within two miles of apple orchards.

The red cedar, aside from its ornamental use, has occasional use and value as lumber. It is indigenous to Virginia, is not cultivated or dealt in commercially on any substantial scale, and its value throughout the state is shown to be small as compared with that of the apple orchards of the state. Apple growing is one of the principal agricultural pursuits in Virginia. The apple is used there and exported in large quantities. Many millions of dollars are invested in the orchards, which furnish employment for a large portion of the population, and have induced the development of attendant railroad and cold storage facilities.

On the evidence we may accept the conclusion of the Supreme Court of Appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. Compare *Bacon* v. *Walker*, 204 U. S. 311; *Missouri, Kansas & Texas Ry.* v. *May*, 194 U. S. 267; *Chicago, Terre Haute & Southeastern Ry.* v. *Anderson*, 242 U. S. 283; *Perley* v. *North Carolina*, 249 U. S. 510. And where the public interest is involved

preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property. *Mugler* v. *Kansas,* 123 U. S. 623; *Hadacheck* v. *Los Angeles,* 239 U. S. 394; *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365; *Fertilizing Co.* v. *Hyde Park,* 97 U. S. 659; *Northwestern Laundry* v. *Des Moines,* 239 U. S. 486; *Lawton* v. *Steele,* 152 U. S. 133; *Sligh* v. *Kirkwood,* 237 U. S. 52; *Reinman* v. *Little Rock,* 237 U. S. 171.

We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute. See *Hadacheck* v. *Los Angeles, supra,* 411. For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process. The injury to property here is no more serious, nor the public interest less, than in *Hadacheck* v. *Los Angeles, supra; Northwestern Laundry* v. *Des Moines, supra; Reinman* v. *Little Rock, supra,* or *Sligh* v. *Kirkwood, supra.*

The statute is not, as plaintiffs in error argue, subject to the vice which invalidated the ordinance considered by this Court in *Eubank* v. *Richmond,* 226 U. S. 137. That ordinance directed the committee on streets of the city of Richmond to establish a building line, not less than five nor more than thirty feet from the street line whenever requested to do so by the owners of two-thirds of the property abutting on the street in question. No property owner might build beyond the line so established. Of this the Court said (p. 143), "It [the ordinance] leaves no discretion in the committee on streets as to whether the street [building, *semble*] line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In

other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent."

The function of the property owners there is in no way comparable to that of the "ten or more reputable freeholders" in the Cedar Rust Act. They do not determine the action of the state entomologist. They merely request him to conduct an investigation. In him is vested the discretion to decide, after investigation, whether or not conditions are such that the other provisions of the statute shall be brought into action; and his determination is subject to judicial review. The property of plaintiffs in error is not subjected to the possibly arbitrary and irresponsible action of a group of private citizens.

The objection of plaintiffs in error to the vagueness of the statute is without weight. The state court has held it to be applicable and that is enough when, by the statute, no penalty can be incurred or disadvantage suffered in advance of the judicial ascertainment of its applicability. Compare *Connally* v. *General Construction Co.*, 269 U. S. 385.

Affirmed.

LEVY v. INDUSTRIAL FINANCE CORPORATION, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 217. Argued February 24, 1928.—Decided March 5, 1928.

Section 14b (3) of the Bankruptcy Act which withholds a discharge from a bankrupt who obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person, applies where the bankrupt through his false statement obtained a loan for a corporation controlled by him and in which he was largely interested as a stockholder and creditor. P. 283.

16 F. (2d) 769, affirmed.

CERTIORARI, 274 U. S. 731, to a judgment of the Circuit Court of Appeals affirming a denial of a discharge in bankruptcy.

Mr. S. M. Brandt for petitioner.

Messrs. R. Randolph Hicks, James J. Irwin, Jr., and *Evelyn P. Luquer* were on the brief for respondents.

MR. JUSTICE HOLMES delivered the opinion of the Court.

Levy, a bankrupt, was denied a discharge by the District Court, and the denial was affirmed on appeal by the Circuit Court of Appeals. 16 F. (2d) 769. In view of a conflict between this decision and *In re Applebaum,* 11 F. (2d) 685, a writ of certiorari was granted by this Court, 274 U. S. 731. The conflict concerns the construction of § 14b(3) of the Bankruptcy Act. (July 1, 1898, c. 541, 30 Stat. 550; June 25, 1910, c. 412, § 6, 36 Stat. 838, 839.) By that section "the judge shall . . . discharge the applicant unless he has . . . (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person." The facts that raise the question are found to be as follows. The bankrupt was president of The American Home Furnishers Corporation, had the general management and control of it, had made large advances to it, and with his sister-in-law owned more than two-thirds of the stock; he obtained a loan of $1,500,000 to the corporation from the objectors and, in order to obtain it, made to them a statement in writing, known by him to be false, which very materially overstated the assets of the corporation. There is no doubt of his pecuniary interest in the result of the fraud found to have been practiced by

him, but it is said that he did not obtain money by this fraud, inasmuch as the money went to the corporation and not to him.

A man obtains his end equally when that end is to induce another to lend to his friend and when it is to bring about a loan to himself. It seems to us that it would be a natural use of ordinary English to say that he obtained the money for his friend. So, when the statute speaks simply of obtaining money, the question for whom the money must be obtained depends upon the context and the policy of the act. It would seem that so far as policy goes there is no more reason for granting a discharge to a man who has fraudulently obtained a loan to a corporation which is owned by him and in which his interests are bound up, than for granting one to a man who has got money directly for himself. *In re Dresser & Co.*, 144 Fed. Rep. 318. It is true that the narrower construction is somewhat helped by the words " for the purpose of obtaining credit from such person," which naturally would be taken to mean for the purpose of obtaining credit for himself and so would fortify the interpretation that only immediate benefit was contemplated. But we cannot think it possible that the statute should be taken to allow an escape from its words, fairly read, by the simple device of interposing an artificial personality between the bankrupt and the lender. We go no farther than the facts before us, and without intimating that our decision would be different, we express no opinion as to how it would be if the bankrupt had no substantial pecuniary interest in the borrower's obtaining the loan. The later amendment, by the Act of May 27, 1926, c. 406, § 6, 44 Stat. 662, 663, serves to limit the bars to a discharge more narrowly and by indirection to favor the defendant's position by a change of the words to " a materially false statement . . . respecting his financial con-

dition." But that statute did not govern this case and cannot be invoked for the construction of the earlier law. As to the suggestion *In re Applebaum* that the language before us may have been drawn from the original statute of false pretenses (referring we presume to 30 Geo. II, c. 24,) and that the words should be taken with the construction first given to them, it is enough to reply with the Court below that it is equally likely that they were taken from a more modern source, and were used with knowledge of the broader interpretation of later days.

Decree affirmed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

McMASTER ET AL. *v.* GOULD ET AL.

CERTIORARI TO THE SUPREME COURT OF NEW YORK

No. 85. Argued October 28, 1927.—Decided March 5, 1928.

By the law of New York (Civ. Pr. Act. § 588), appeals from judgments of the Supreme Court, Appellate Division, which finally determine actions or special proceedings, may be taken to the Court of Appeals as of right in certain cases, and, in others, may be allowed upon application, by the Appellate Division, or, in case of refusal, by the Court of Appeals; but if an appeal which is not of right be taken without such leave, it must be dismissed. Petitioners, having been refused leave by the Appellate Division, sued out an appeal which was dismissed by the Court of Appeals without opinion.

Held, that the dismissal must be taken as a holding that the case was not appealable of right; and that, since the petitioners had omitted to apply for leave to the Court of Appeals, the judgment of the Appellate Division was not that of the highest court of the State in which a decision could be had, and the writ of certiorari must therefore be dismissed. P. 286.

Dismissed.

CERTIORARI, 273 U. S. 677, to the Supreme Court of New York, Appellate Division, 215 App. Div. 871, to review a judgment affirming a refusal to make an order of substitution.

Mr. Louis Marshall, with whom *Mr. James Marshall* was on the brief, for petitioners.

Mr. Wm. Wallace, Jr., for respondents.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This record presents a preliminary question as to our jurisdiction under the writ of certiorari.

The petitioners brought an action in equity in the Supreme Court of New York against George J. Gould and others for an accounting of syndicate funds. Gould having died before the trial, the petitioners, proceeding under a rule to show cause, moved for an order substituting the respondents, the executors of his estate, as parties defendant, and reviving the action as against them. The court denied this motion and dismissed the rule to show cause; and this was affirmed by the Appellate Division, without opinion. 215 App. Div. 811. The petitioners moved the Appellate Division "for leave to appeal to the Court of Appeals." This was denied. The petitioners then took an appeal without leave. This was dismissed by the Court of Appeals, without opinion. 242 N. Y. 604.

The petitioners contend that although the judgment of the Appellate Division does not finally and completely dispose of the entire action, it is nevertheless a "final judgment" which may be reviewed under § 237(b) of the Judicial Code, as it is a "final" and complete judgment in an ancillary and "independent proceeding" to revive the action against the respondents. The respondents contend that, even if this be so, it is not, under that section,

the judgment of the highest court of the State in which a decision could be had, since the petitioners did not apply to the Court of Appeals for leave to appeal.

Sec. 588 of the New York Civil Practice Act authorizes the taking of an appeal to the Court of Appeals from a judgment or order of the Appellate Division "which finally determines an action or special proceeding." Subd. 1 provides that such an appeal may be taken "as of right" in certain classes of cases. Subd. 4[1] provides that where such an appeal does not lie as of right under Subd. 1, it may be taken where the Appellate Division certifies that in its opinion a question of law is involved which ought to be reviewed, or where, in case of the refusal so to certify, an appeal is allowed by the Court of Appeals. To obtain such a a discretionary appeal application may be made to the Appellate Division for leave to appeal, and in case of refusal, to the Court of Appeals. See § 591; *Sultzbach* v. *Sultzbach,* 238 N. Y. 353, 355. And when an appeal which is not a matter of right is taken without leave, it must be dismissed. *People* v. *Trimarchi,* 231 N. Y. 263, 268; *Pillsbury Flour Mills Co.* v. *Nicotera,* 234 N. Y. 534; *Matter of Schmidt,* 236 N. Y. 645, 646; *Donovan* v. *Cunard Steamship Co.,* 236 N. Y. 651; *Johnson* v. *Whaley,* 239 N. Y. 570, 571.

Assuming the correctness of the petitioners' contention that the judgment of the Appellate Division is a "final" determination of an independent proceeding to revive the action against the respondents, the dismissal by the Court of Appeals of the appeal sued out without leave, must be taken, nothing else appearing, as a holding by that court that the case was not one in which an appeal lay as a matter of right. And since the petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the Court of Appeals for such

[1] Changed to Subd. 5 by Laws of 1926, ch. 725.

leave, the judgment is not that of the highest court of the State in which a decision could be had. See *Newman* v. *Gates*, 204 U. S. 89, 95. In any respect we are without authority to review the judgment; and the writ is

Dismissed for want of jurisdiction.

MR. JUSTICE STONE did not sit in this case.

GOODYEAR TIRE & RUBBER COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 159. Argued January 10, 1928.—Decided March 12, 1928.

1. A lease to the United States for a term of years, made without any specific authority of law, and entered into when there was no appropriation available for the payment of rent after the first fiscal year, does not bind the Government after that year. Rev. Stats. §§ 3732, 3679. *Leiter* v. *United States*, 271 U. S. 204. P. 291.
2. To make such a lease binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year. P. 292.
3. Holding over by government officials after the fiscal year, accompanied by a manifestation of their intention not to bind the United States to pay rent beyond the period of actual occupancy, will not work a renewal for the whole of the ensuing fiscal year even where there is an appropriation covering rent for that year, and although, under the state law a private lessee holding over would be bound to a year's renewal by legal implication regardless of his intention. P. 292.
4. The right to sue the United States under the Tucker Act on a claim founded on contract, must rest upon an express contract or one implied in fact; the Act gives no right of action in a case where, if the transaction were between private parties, a recovery could be had upon a contract implied in law. P. 293.

62 Ct. Cls. 370, affirmed.

CERTIORARI, 273 U. S. 692, to a judgment of the Court of Claims dismissing on demurrer a suit to recover rent.

Mr. Spencer Gordon, with whom *Mr. Dean Acheson* was on the brief, for petitioner.

The attempted lease for five years subject to appropriations each year resulted in a lease for one year with option on the part of the United States to renew. *McCollum* v. *United States,* 17 Ct. Cls. 92; *Smoot* v. *United States,* 38 Ct. Cls. 318. Prior to June 30, 1923, the United States was therefore in possession under an existing lease.

As a tenant of Ohio property the United States was subject to the laws of Ohio. *United States* v. *Bostwick,* 94 U. S. 53; *Clifford* v. *United States,* 34 Ct. Cls. 223; *Conn. Mut. Life Ins. Co.* v. *United States,* 21 Ct. Cls. 195; *Spoffard* v. *United States,* 32 Ct. Cls. 452; *Blair* v. *United States,* 53 Ct. Cls. 457

Under the common law of Ohio, where rent is reserved annually, and the tenant holds over and states that he does not intend to be bound for another year but the landlord states that he intends to hold the tenant for another year, the tenant is held for the entire succeeding year. *Strong* v. *Schmidt,* 8 Cir. Dec. 551; *Rosenbaum* v. *Pendleton,* 9 O. D. 642; *Kerruish* v. *Cleveland, etc., Brewing Co.,* 17 Oh. C. C. (N. S.) 449.

There is nothing in the federal statutes or decisions which prevents this rule from applying in the present case. In order to hold the United States there need only be (1) authority to bind the United States for the ensuing year, (2) an act by the authorized officers. *Leiter* v. *United States,* 271 U. S. 204.

It was not necessary that the government officials enter into an express written contract in order to bind the United States. So long as there was an appropriation available they could bind the United States by doing the

thing that the law of Ohio provided would make the tenant liable for another year, that is, by holding over.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Messrs. James J. Lenihan* and *John E. Hoover,* Attorneys in the Department of Justice, were on the brief, for the United States.

There was no express contract in this case binding the United States to pay rent for the full year ending June 30, 1924. On the contrary, the United States, at the time of the expiration of the original term, expressly rejected the proposition that it would become liable for the additional term of one year. The question remains whether there was an implied contract within the meaning of the jurisdictional statute relating to the Court of Claims. An implied contract must be one implied in fact and not by operation of law. *Tempel* v. *United States,* 248 U. S. 121; *Ball Engineering Co.* v. *White & Co.,* 250 U. S. 46; *Horstmann Co.* v. *United States,* 257 U. S. 138; *Klebe Co.* v. *United States,* 263 U. S. 188.

If the tenant holds over after the expiration of his term without anything being said by him or his landlord respecting the nature of the resulting obligation, a contract for the additional term may be one implied in fact, on the theory that the situation and conduct of the parties shows a real intention that the tenant shall become a tenant for an additional term of one year; but this can not be so where the tenant at or before the time when the holding over commences expressly declares to his landlord that he intends to be bound only for the length of time he remains in possession. 2 Tiffany, Landlord & Tenant, 1472. See also *Clinton Co.* v. *Gardner* 99 Ill. 151; *Herter* v. *Mullen,* 159 N. Y. 28.

The law of landlord and tenant in the State of Ohio is not a subject inviting attention from this Court. In

most states of the Union statutes have been enacted which would prevent any such question as is here presented from arising in cases of leases to the United States and which prescribe that in a case of holding over, where the creation of a tenancy at will has resulted, notice to quit is sufficient if given for thirty or sixty days. See *Leavitt* v. *Maykel,* 203 Mass. 506.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Goodyear Company brought this action under the Tucker Act,[1] to recover rent claimed under a lease to the United States. The petition was dismissed, on demurrer, for failure to state a cause of action. 62 Ct. Cls. 370.

The facts alleged were these: In October, 1921, the predecessor of the Goodyear Company leased to the United States, for the use of the Veterans' Bureau, certain premises in Cincinnati, Ohio, for a term ending June 30, 1926, at a stipulated annual rental payable in monthly instalments. No appropriation was then available for payment of the rent after the first fiscal year, ending June 30, 1922;[2] and the lease provided that if an appropriation was not made under which the rent for any succeeding fiscal year might be paid, it should automatically terminate as of June 30 of the year for which an appropriation was last available.

The lessor assigned and transferred the lease to the Goodyear Company in January, 1922. In June an appropriation was made, available for the fiscal year ending June 30, 1923; and the lease was by agreement "renewed" for that year. In February, 1923, an appropriation was

[1] 24 Stat. 505, c. 359; Jud. Code, § 145, U. S. C., Tit. 28, § 250.

[2] The fiscal years begin on July 1st of each year and terminate on June 30th of the next year.

made, available for the fiscal year ending June 30, 1924. Before June 30, 1923, the officials of the Veterans' Bureau informed the Company that the United States would give up the occupancy of the premises as of that date. "When June 30, 1923, arrived"—as the petition alleged—"the officials of the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year, the officials of the Veterans' Bureau then stating that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the officials of the claimant company stating that it was their contention that . . . even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the laws of the State of Ohio by reason of holding over." The United States continued in possession to December 20, 1923, when it vacated the premises. The rent was paid to December 31, 1923.

The Company claimed that "by reason of holding over" the United States was bound for the entire fiscal year ending June 30, 1924, and liable for the unpaid rental to that date.[3]

In *Leiter* v. *United States,* 271 U. S. 204, 207, we held that a lease to the United States for a term of years, made without any specific authority of law and entered into when there was no appropriation available for the payment of rent after the first fiscal year, in so far as its terms extend beyond that year, violates the express provisions

[3] This claim had been rejected by the Comptroller General. 5 Gen. Comp. 172. An alternative claim presented by the petition that the United States was bound by the original lease for the full term to June 30, 1926, was abandoned before the hearing.

of Sections 3732 and 3679 of the Revised Statutes [4] and creates no binding obligation on the Government after that year; and that "to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year."

The Company contends "that since there was a Federal appropriation before June 30, 1923, pursuant to which the lease might have been extended to June 30, 1924, and since by the common law of Ohio, where the land was, such a holding over on June 30, 1923, would have created a tenancy to June 30, 1924, as between individuals, the United States became bound for the year by the act of holding over coupled with the authority to lease the property contained in the appropriation act."

We cannot sustain this contention. In order to bind the Government for the fiscal year ending June 30, 1924, it was necessary, as held in the *Leiter* case, that after the available appropriation had been made, the Government should affirmatively continue the lease for that year, that is, in effect, make a new lease for the year under the authority of such appropriation. This it did

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[4] Sec. 3732 provides that "No contract . . . on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment. . . ." Sec. 3679, as amended in 1906, provides that "No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law."

not do, either expressly or impliedly. On the contrary, the notice given by the officials of the Veterans' Bureau to the Company, before holding over, that the Government did not intend to pay rent beyond the actual period of occupancy, negatived any intention to continue the lease for the entire year, and left no basis for inferring an agreement to continue it after the Bureau should cease to occupy the premises. It is immaterial that under the common law in Ohio as applied between private parties, a lessee holding over after the expiration of his lease is held, at the option of the lessor, to be bound for another year, under an agreement implied in law, regardless of his actual intention, *Railroad Co.* v. *West,* 57 Ohio St. 161, 165, 168; *Bumiller* v. *Walker,* 95 Ohio St. 344, 349. Not having affirmatively continued the lease beyond the actual period of occupancy, the Government cannot, under the doctrine of the *Leiter* case, be bound for a longer term.

Furthermore, independently of that doctrine, the right here invoked to sue the United States under the Tucker Act on a claim founded on contract—as this is—must rest upon the existence of a contract express or implied in fact, no right of action being given by the Act in cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law. *Sutton* v. *United States,* 256 U. S. 575, 581; *Merritt* v. *United States,* 267 U. S. 338, 341; *United States* v. *Minn. Investment Co.,* 271 U. S. 212, 217. And see *Balt. & Ohio R. R.* v. *United States,* 261 U. S. 592, 597.

The judgment is

Affirmed.

MR. JUSTICE HOLMES.

There was no adverse holding in this case. The United States admitted that it occupied the premises under a

contract as lessee until June 30, 1923. One consequence of this contract by the law that governed it and by the stipulation of the lessor was that if the lessee held over he held over for a year. I do not see how the United States could accept the contract and repudiate the consequence, or accept the permission of the lessor to continue in possession upon the express condition that it be bound for a year and repudiate the condition, except in the event of there being no appropriation in which case the paramount law of the United States would prevail. There was an appropriation here and therefore there was nothing to hinder the United States being bound until June 30, 1924, except the statement of the agents that it did not mean to be, which seems to me merely the statement that it did not mean to accept the legal consequence of its act.

MR. JUSTICE SUTHERLAND and MR. JUSTICE STONE concur in this opinion.

IN RE GILBERT.

PROCEEDINGS FOR DISBARMENT OR CONTEMPT.

Order entered March 19, 1928.

1. The former order of this Court, 259 U. S. 101, limiting the compensation allowable to the respondent herein, as master in the New York Gas cases, applied not only to the part taxable to the City of New York as costs, but also to the part paid by the successful plaintiffs. P. 297.
2. A master in the District Court, who, despite a decree of this Court limiting his allowance, retained excessive fees, relying on the tolerance and favor of the successful litigants that paid them, and who persisted further by securing, with their acquiescence, a futile declaratory judgment in the state court declaring that he owed them nothing—*held* guilty of wrong doing, for which, in addition to restoring the excess amounts, with interest, he must be suspended from his rights and privileges as a member of the bar of this Court for six months, and be assessed the costs of this proceeding. P. 298.

RETURN to an order upon the respondent to show cause why he should not be disbarred from this Court and punished for contempt, because of his having retained master's fees allowed him by the District Court but adjudged excessive on appeal here. For an earlier decision in this proceeding, see *ante,* p. 6. See also 259 U. S. 101; 275 U. S. 499.

Mr. James M. Beck for the respondent.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This proceeding was begun by a Rule issued November 21st last against Abraham S. Gilbert, of New York, a member of the bar of this Court, directing him to report concerning fees or allowances to him as master in a number of causes known as the *New York Gas Cases,* in the District Court for the Southern District of New York, exceeding the maximum amount which had been held by this Court on review of the cases to be permissible, although our decision was announced in the October Term, 1921. 259 U. S. 101. Gilbert was required to show cause why on this account his name should not be stricken from the roll of attorneys permitted to practice in this Court, or he be punished for contempt or otherwise dealt with as the circumstances required. On the return day, January 16th, he presented himself and was heard by counsel. On January 23d, this Court announced in an opinion, in which the facts were set forth, that it was Gilbert's duty, without further delay, to return the excess with interest thereon at 6 per cent. from May 15, 1922, and further action was then postponed until Monday, February 20, 1928. On that day the respondent presented himself and submitted cancelled checks and receipts showing his payment of the excess to the parties litigant entitled thereto, with interest as ordered, the aggregate being $92,744.32.

This case now comes on for final action.

In his answer the respondent suggests that he had never had any opportunity on his own behalf to show by hearing and argument the justice of the compensation awarded to him by the District Court, and seeks to raise doubt as to the conclusion we reached, that the allowance made to him was an abuse of discretion by the District Court. Our conclusion was the result of a careful examination of the statement made by the then master, the present respondent, as to the labor he had performed, and after full consideration. We were desirous of making it clear by our action that the judges of the courts, in fixing allowances for services to court officers, should be most careful, and that vicarious generosity in such a matter could receive no countenance.

The respondent further says:

"In reversing the orders appealed from, this Court made no order or direction which required me to return the excess fee that had already been paid me by the Gas Companies. Neither the District Judge, who entered the orders in compliance with the mandate of this Court, nor counsel for the Gas Companies, nor counsel for any of the defendants, ever even suggested that the decision or mandate of this Court required the entry of orders by the District Court Judge directing the return by me of the excess fees to the Gas Companies, which had willingly paid them in the first instance and had believed them to be fair in amount.

"Upon receipt of the mandate of this Court, the District Court, upon notice to all parties, without any action on my part, and without any appearance by me, entered the order in the Consolidated Gas case as follows:

"'1. The judgment of the Supreme Court of the United States is hereby made in all respects the judgment of this Court.

"'2. The compensation of A. S. Gilbert as Special Master herein, to the extent of $28,750, together with the sum of $655.38 for necessary disbursements of the Master, shall be taxed as costs in this suit, to be paid equally by the defendants as provided by the final decree, dated August 11, 1920.'

"Similar orders were entered in the remaining seven cases, directing the taxation of costs against the defendants in the sums fixed by this Court.

"All of the parties to the litigation thus placed a construction upon the decision of this Court which left the compensation directed to be paid to me unchanged, except as to the amounts that could be taxed as costs against the appellants; and it is apparent from the form of the order upon mandate that the District Judge took the same view of the effect of the decision of this Court."

It is enough to say that we differ entirely from the inference that this Court intended that the referee should retain as his fees moneys already paid him. There is nothing in the record justifying the suggestion that this Court intended to allow any other compensation than that which was discussed and decided in its opinion. If the parties or the District Judge conceived that this Court desired to eliminate as negligible from its decision the fees already paid the referee, there was no warrant for the assumption.

The fees which had been paid and the failure to return them did not affect the amount of the costs due from defendant, the City of New York, which was only one-half of fees allowed by this Court. Thus the city was not prejudiced by respondent's failure to return the amount due. The officers of the companies litigant seem to have been so satisfied with winning the merits of the issue between them and the City of New York as to be willing that the referee should retain the illegal excess which,

under our decision, belonged to them. Thus it came to pass that the parties who would naturally have seen to it, by application to the District Court, or this Court, that our decision was complied with, took no action and virtually acquiesced in a defeat of our decision.

If, in the opinion of the Gas Companies and of the District Judge, our conclusion in the case was mistaken and unjust, it was open both to the respondent Gilbert and to the Gas Companies to bring the matter again before this Court for reconsideration, instead of allowing our decision to be defeated. But, instead of coming to the tribunal which had authoritatively decided the matter, Gilbert relied on the tolerance and favor of the litigant companies, in whose favor on the merits of the case he had decided the issue, not to move for compliance with our decision. This was the front of his wrongdoing. He persisted further by a futile proceeding in a New York state court to secure a declaratory judgment that he owed nothing to the litigant companies, although such an obligation to pay them was the necessary effect of our decision and the existing facts known to him. In that proceeding he evidently relied again on the friendly attitude of the litigant companies and their acquiescence, though against their pecuniary interest. The so-called declaratory judgment was futile.

We realize that by our order we have required not only restitution of what Gilbert kept in excess of our decision, but also six per cent. interest thereon for nearly six years, so that his restitution now leaves him little out of the fee which we held he was entitled to receive. More than this, he paid income taxes for one year on the whole fee as allowed by the District Court.

But mere restitution is not enough, considering respondent's departure from duty. We must give our action a punitive quality to mark the high obligation of the members of the bar to respect the decisions of the Court. The

order will be that Abraham S. Gilbert be suspended from his rights and privileges as a member of the bar of this Court for six months from this day and that he pay the costs of this proceeding.

MITCHELL ET AL. v. HAMPEL ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 269. Argued March 2, 1928.—Decided March 19, 1928.

When a creditor holds an obligation of a bankrupt firm upon which members of the partnership have, as joint principals or sureties, made themselves individually liable, he is entitled, under the Bankruptcy Law, to prove his claim both against the partnership estate and the individual estates. P. 302.

18 F. (2d) 3, reversed.

CERTIORARI, 275 U. S. 512, to a decree of the Circuit Court of Appeals reversing a decree of the District Court which had permitted Mitchell, as County Treasurer, to prove a claim of the County against a bankrupt firm of bankers, with which its funds were deposited, and also against members of the firm individually. Hampel *et al.* were trustees in bankruptcy.

Mr. Thomas W. Gregory, with whom *Messrs. W. N. Foster* and *Fred R. Switzer* were on the brief, for petitioners.

Cited: *Chapman* v. *Bowen,* 207 U. S. 88; *Myers* v. *International Trust Co.,* 273 U. S. 382; *In re McCoy,* 150 Fed. 106; *Bank of Reidsville* v. *Burton,* 259 Fed. 218; *Buckingham* v. *Bank,* 131 Fed. 192; *Reynolds* v. *New York Trust Co.,* 188 Fed. 613; *In re Kardos,* 17 F. (2d) 707; *In re Farnum,* Fed. Cas. No. 4674; *Emery* v. *Canal Nat'l Bank,* Fed. Cas. No. 4446; *Fourth Nat'l Bank* v. *Mead,* 216 Mass. 521.

Mr. E. B. Colgin, with whom *Mr. Lewis R. Bryan* was on the brief, for respondents.

The so-called American rule allowing double proof is an artificial offshoot born of a technical analysis of the old equity rule of marshalling of assets. Its effect is unjust enrichment at the expense of the partnership creditor. It is too technical, artificial and unjust to find favor in a court of equity. *Swartz* v. *Siegel,* 117 Fed. 13; *In re Faulkshire,* 153 Fed. 503; *Adams* v. *Hoyt Co.,* 164 Fed. 489.

The Circuit Court of Appeals properly determined the rights of the parties to a non-negotiable contract, an indemnity bond wholly the creature of the statutory law of the State of Texas, in accordance with the law of the State of Texas. *Myers* v. *International Trust Co.,* 273 U. S. 382; *Fourth Nat'l Bank* v. *Mead,* 216 Mass. See also *Bayne* v. *Cusimano,* 50 La. Ann. 361; *Nashville Saddlery Co.* v. *Green,* 127 Miss. 98; 30 Cyc. 455.

Under the law of the State, the members of the co-partnership were jointly and severally liable to the creditors of the firm, and they could not make themselves individually liable in contradistinction from their individual liability as such members of the firm by attempting to become sureties on their co-partnership bond, the debt created by the bond being exclusively for the benefit of the partnership. Vernon's Sayles' Civil Statutes, 1914, Art. 6147; Rev. Stats. of Texas, 1925, Art. 6111; *Fowler Commission Co.* v. *Land & Co.,* 248 S. W. 314; *Bank* v. *Cup & Co.,* 59 Tex. 268; *Laning* v. *Bank,* 36 S. W. 481.

In refusing to allow the double proof, the court below prevented an inequitable preference and secured to all creditors an "equitable distribution of the property of the several estates" as intended by the Bankruptcy Act, § 5 (g). *Fort Pitt Coal & Coke Co.* v. *Diser,* 239 Fed. 443; *Schall* v. *Camors,* 251 U. S. 239.

Under the present Bankruptcy Act, double proof is allowable only where a creditor holds two distinct obligations, (a) the obligation of the firm as such, and (b) the obligation of the individual not linked with the partnership transactions, and therefore independent in character. *LaMoylle County Nat'l Bank* v. *Stevens,* 107 Fed. 245; *In re Mosier,* 112 Fed. 138; *In re Kendrick & Co.,* 226 Fed. 978; *Texas L. & C. Co.* v. *Carroll & Iler,* 63 Tex. 51; *Sanger* v. *Warren,* 91 Tex. 482; *Metcalf* v. *Williams,* 104 U. S. 98; *Lerned* v. *Johns,* 9 Allen 419; *Brown* v. *Parker,* 7 Allen 339; *Huntington* v. *Knox,* 7 Cush. 373; *Slawson* v. *Loring,* 5 Allen 342; *Railroad Co.* v. *Benedict,* 5 Gray 561; *Green* v. *Skeel,* 2 Hun. 487; *Burns* v. *Parish,* 3 B. Mon. 8; *McKee* v. *Hamilton,* 33 Ohio St. 7; *Weaver* v. *Tapscott,* 9 Leigh, 424.

That double proof is dependent on the laws of the State where the contract is made and to be performed, see: *Myers* v. *International Trust Co.,* 273 U. S. 382; *Chapman* v. *Bowen,* 207 U. S. 88; *Robinson* v. *Seaboard, etc.,* 247 Fed. 667; *In re Jarmoulouski,* 287 Fed. 703; *In re McCoy,* 150 Fed. 106; *Hiscock* v. *Varick Bank,* 206 U. S. 28; *Fourth Nat'l Bank* v. *Mead,* 216 Mass. 52.

The Bankruptcy Act does not suspend the laws of any State, but merely substitutes its own form of procedure and administration. *Reynolds* v. *New York Trust Co.,* 106 Fed. 613; *Hiscock* v. *Varick Bank,* 206 U. S. 28.

Mr. Justice Holmes delivered the opinion of the Court.

J. H. P. Davis & Co. of Fort Bend County, Texas, partners, were adjudicated bankrupts both as a firm and individually. They were bankers and depositories of County funds. As such they had given two joint and several bonds both signed by the firm in its firm name as principal and by some of the members of the firm

individually, with others, as sureties. The County sought to prove its claim, not only against the firm but also against the separate estates of the surviving members, all of whom had bound themselves severally as well as jointly. The double proof was allowed by the District Court but was disallowed by the Circuit Court of Appeals on the ground that the Bankruptcy Act, § 5f, by appropriating the individual estate of a partner to his individual debts, excluded by implication debts that were also debts of the partnership from sharing with the former on equal terms. Act of July 1, 1898, c. 541, 30 Stat. 548. C. Tit. II, c. 3, § 23. 18 F. (2d) 3.

We are of opinion that the District Court was right. Except so far as the statute may prevent it, a solvent man dealing with another for money to be advanced to or deposited with his firm may determine the security to be given as he and the other may agree. He may mortgage his private estate, and we perceive no reason why he may not create a claim against it in bankruptcy by a separate contract of his own. The firm creditors know that they will be postponed to individual creditors, and that they have no voice or knowledge as to who the individual creditors shall be, or what the amount of their claims. The only real equity is not to disturb the equilibrium established by the parties. Those who take less security have no claim to be put on a footing with those who require more. It is not necessary to go into nice speculations as to what a partner can add to the liability already incurred when he offers a separate contract in addition to that which is made by his firm. We may assume that by the firm contract he is bound to the uttermost farthing—but he is bound only as a member of the firm, and therefore subject to the bankruptcy rule. His creditor may require more, and we can see nothing to hinder his putting himself in the position of a separate

debtor also. Certainly we find no prohibition in the bankruptcy law. *Myers* v. *International Trust Co.*, 273 U. S. 380. By making a separate contract, although in the same instrument, he calls the separate liability into being, as presumably he intends to and as he has a right to do. *Robinson* v. *Seaboard National Bank of New York*, 247 Fed. 667, 668, 669, *Ibid*, 1007. The intent and transaction are not illegal in Texas. Their specific effect depends on the Bankruptcy Act.

We have dealt with the only question which induced the granting of the writ. It does not appear to us necessary to go into further details.

Decree reversed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* JONES, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 349. Argued March 8, 1928.—Decided March 19, 1928.

An experienced car inspector was found dead with his lantern, at night, between a track on which a freight train was being made up and the main track parallel to it, over which a train, by which he was probably killed, had passed with much noise and a bright light, but with bell silent, twenty minutes before his body was discovered. He was last seen alive twenty minutes before the train passed. There were indications that there was nothing to inspect at the time when the accident occurred.

Held, that a verdict of damages based on the assumption that he was engaged in inspecting the freight cars, relying on the customary ringing of the bell, and so absorbed in his work that he did not hear the approaching train, was mere guess-work. P. 304.

291 S. W. 528, reversed.

CERTIORARI, 275 U. S. 514, to a judgment of the Supreme Court of Texas, which, reversing the Court of Civil Appeals, affirmed a judgment for damages recovered from

the railway in an action under the Federal Employers' Liability Act. The judgment of the Supreme Court was entered on the recommendation of the Commission of Appeals. See 282 S. W. 312; 287 *Id.* 304.

Mr. A. F. Smith, with whom *Messrs. Frank H. Moore, J. J. King, J. Q. Mahaffey,* and *S. W. Moore* were on the brief, for petitioner.

Mr. S. P. Jones, with whom *Mr. Franklin Jones* was on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the Court.

This is an action under the Employers' Liability Act for the death of one R. D. Ferguson, who was a car inspector on the petitioner's road. No one saw the death, but the body was found between the main track and a parallel track, and the probability is that Ferguson was killed by a train going north on the former. A freight train was being made up on the parallel track, and the hypothesis of the respondent, supported by little if anything except the place where the body and the lantern of the deceased were found, is that Ferguson was engaged in inspecting the cars, and so absorbed in his work that he did not hear the approaching train, but was relying upon the ringing of the engine bell, which usually was rung but which the respondent's witness say was not rung on this occasion. The Court below sustained the verdict on this ground. Ferguson was seen not later than a quarter before seven in the evening, so far as time can be fixed. The train passed at five minutes after seven, the time at which it was known by him to be due. His body was found at twenty-five minutes after seven. He was an experienced man. The indications are that there was nothing for him to inspect at the probable time of his death. At best it is a mere guess that he

was so engaged, still more that he was absorbed in such work. The main track was straight and the train was making a great noise and showing a bright light as it approached. Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself. It is unnecessary to consider whether if the case for the plaintiff were stronger the principle of *Chesapeake & Ohio Ry. Co.* v. *Nixon,* 271 U. S. 218, would apply.

Judgment reversed.

FAIRBANKS, MORSE & COMPANY ET AL. *v.* AMERICAN VALVE & METER COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 262. Returns to rule to show cause submitted February 20, 1928.—Decided March 19, 1928.

1. The Circuit Court of Appeals may decline to reëxamine the evidence on appeal when not condensed and stated as required by Equity Rule 75b. P. 308
2. But where the evidence was stated and approved in accordance with a practice theretofore prevailing in the circuit with the implied sanction of the Circuit Court of Appeals, and where one of the judges of that court had made an order declaring that the transcript was received as a sufficient compliance with the equity rules, it was error to proceed to a determination of the case without considering the evidence before affording the appellants an opportunity to comply with Rule 75b, by remitting the transcript to the District Court for further proceedings in conformity therewith. *Barber Asphalt Co.* v. *Standard Co.,* 275 U. S. 372. P. 308.
3. Such opportunity was not given by an order allowing the appellants to withdraw the transcript for 30 days; they were entitled to a specific order operating as a direction to the District Court. P. 309.

4. Both parties being at fault through having brought the evidence into the transcript in objectionable form by their express stipulation, and the objection to it having been made by the court of its own motion, each party is left to pay its own costs in that court and this, and counsel fees and expenses are not inflicted on the appellants as in *Barber Asphalt Co.* v. *Standard Co., supra.* P. 310.

18 F. (2d) 716, reversed.

CERTIORARI, 274 U. S. 735, to a decree of the Circuit Court of Appeals, affirming, with modifications, a decree for profits in a patent infringement suit. The Court of Appeals declined to reëxamine the evidence upon the ground that Equity Rule 79b had not been complied with. This Court directed the parties to show cause why the case should not be disposed of in accordance with *Barber Asphalt Co.* v. *Standard Asphalt Co.*, 275 U. S. 372.

Messrs. Fred L. Chappell, Carroll J. Lord, and *Howard M. Cox* were on the brief for petitioners.

Mr. Frank A. Whitely was on the brief for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a suit for an injunction against the infringement of letters patent and for an accounting. On the first hearing the suit was dismissed for want of equity; but on appeal that decree was reversed. 249 Fed. 234. Further proceedings resulted in an accounting before a master, who returned the evidence taken by him and reported his findings. Both parties excepted; but the findings were approved and the plaintiffs were given a decree for the profits found by the master, with interest from the close of the infringing period and an allowance for fees paid to expert accountants. The defendants appealed, their principal complaint being that the findings and the decree were not in accord with the evidence. The Circuit

Court of Appeals declined to examine that complaint because the appellants had not complied with the provision in equity rule 75b relating to the condensation and narration of the evidence. The minor complaints were examined and the decree was approved as to the profits and interest and was disapproved as to the allowance for payments made to expert accountants. 18 Fed. (2d) 716.

A writ of certiorari was granted by this Court to enable it to review the ruling respecting the non-observance of the equity rule. A like writ already had been granted in *Barber Asphalt Co.* v. *Standard Asphalt Co.*, where the same Circuit Court of Appeals had made a similar ruling. Our decision in that case was announced recently, 275 U. S. 372; and we then directed the parties in this case to show cause why it should not be disposed of in accordance with that decision. Both parties responded in printed briefs which have been considered.

The pertinent part of equity rule 75b declares: "The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, ..." The rule is set forth in full in the opinion in *Barber Asphalt Co.* v. *Standard Asphalt Co.*, and explanation is there made of the reasons for the rule and of the right practice under it.

In that case the appellant had stated the evidence without appreciable condensation or narration and the statement had been approved by the district court. We agreed

with the Circuit Court of Appeals that the statement did not conform to the rule, or to its excepting clause, and that the appellant was not entitled to a reëxamination of the evidence thus wrongly brought into the record. But we held that the situation was one in which that court, upon proper terms, should have remitted the transcript to the district court for the purpose of affording the appellant a further opportunity to conform to the rule. Our reasons for so holding were that in the Seventh Circuit the judges, both circuit and district, commonly had permitted the evidence to be stated without condensation or narration; that the Circuit Court of Appeals had impliedly sanctioned that practice up to the time of its decision in that case; and that to condemn and reject a statement of evidence prepared and approved according to that practice, without according the appellant a further opportunity to conform to the rule, would be so harsh and unseemly as to be an abuse of discretion.

In this case a part of the testimony was stated in condensed and narrative form; but in the main the requirement respecting condensation and narration was wholly neglected. Much that was redundant or to no purpose was included; and document after document was set forth in full where at most there was need for only a part. Plainly what was done was not in conformity with the rule or with its excepting clause. Thus the Circuit Court of Appeals was justified in declining to reëxamine the evidence in the form in which it was stated.

But in our opinion that court, instead of proceeding to determine the case without considering the evidence, should have accorded the appellants a further opportunity to have the evidence rightly brought into the record, and to that end should have remitted the transcript to the district court for further proceedings in conformity with the equity rule. The circumstances surrounding the non-

observance of the rule were substantially identical with those in *Barber Asphalt Co.* v. *Standard Asphalt Co.* In both the evidence was stated and the statement was approved in accordance with the then prevailing practice in that circuit, to which the Circuit Court of Appeals impliedly was giving its sanction. That practice continued up to the time of that court's decision in *Barber Asphalt Co.* v. *Standard Asphalt Co.*, which preceded its decision in this case only a few days. There was in this case the additional circumstance that, when the transcript was filed in the Circuit Court of Appeals, it was brought to the attention of one of the judges of that court, and he then made an order declaring that it was "received as a sufficient compliance with the equity rules." In the other case we directed that a further opportunity be given for complying with the rule, and we think the reasons assigned for that ruling are equally applicable here.

The appellees suggest that the appellants were accorded such an opportunity after the Circuit Court of Appeals gave its decision and that the opportunity was waived. The court did make an order granting a rehearing and giving the appellants leave "to withdraw the transcript" for a period of thirty days. The purpose in giving the leave was not stated, but left to conjecture. Nothing was said about further proceedings in the district court looking to a compliance with the rule or about a remission of the transcript. We think the mere leave to withdraw it was not enough. The fault was not in the transcript but in the proceedings had in the district court whereby the evidence was attempted to be made a part of the record. That court hardly would have regarded the order as requiring it to take up those proceedings anew. The appellants were entitled to a specific order operating as a direction to the district court. Apparently the Circuit Court of Appeals doubted its power in the premises and

for that reason was not disposed to give such an order. We think the suggested waiver has no real basis.

The record does not show whether the rehearing was had, but does show that the court made an order reciting that it adhered to its original opinion and directing that the decree entered thereon be re-entered.

We come then to the terms upon which the appellants should be given further opportunity to get the evidence into the record in accordance with the rule. Of course they should be required to proceed with reasonable dispatch. In *Barber Asphalt Co.* v. *Standard Asphalt Co.*, we directed that the appellant be required to pay a stated sum by way of reimbursing the appellee for counsel fees and expenses incurred in securing the elimination of the irregular and objectionable statement of evidence, and also to pay the costs in the Circuit Court of Appeals and in this Court. There the appellee had objected in the Circuit Court of Appeals at the outset that the rule had not been complied with and therefore that the evidence could not be considered. Here the evidence was brought into the record in the irregular and objectionable form under an express stipulation between the parties to which both adhered up to the time of the decision of the Circuit Court of Appeals. Thus both parties were at fault. In condemning the statement of the evidence the Circuit Court of Appeals acted on its own motion. In these circumstances we think the appellants should not be required to make any payment by way of reimbursing the appellees for counsel fees or expenses, and that each party should be left to pay its costs in this Court and also its costs in the Circuit Court of Appeals up to the time our mandate is carried into effect there.

The decree of the Circuit Court of Appeals is accordingly reversed and the cause is remanded to that court for further proceedings in conformity with this opinion.

Decree reversed.

Syllabus.

SWIFT & COMPANY ET AL. *v.* UNITED STATES.

CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 181. Argued October 3, 4, 1927; reargued January 3, 4, 1928.—Decided March 19, 1928.

1. Where a consent decree, entered in a suit brought by the Government under the Anti-Trust Act, provided for entertaining at any time thereafter any application which the parties might make in respect to it, motions to vacate it made by defendants four years later in response to petitions of intervention and entitled in the suit, were part of the original cause. P. 322.
2. An appeal from an order of the Supreme Court of the District of Columbia overruling defendant's motion to vacate a decree in a suit by the Government under the Anti-Trust Act, does not lie to the Court of Appeals of the District, and where erroneously taken there from an order entered before the effective date of the Jurisdictional Act of February 13, 1925, should be transferred by that court, as a circuit court of appeals, to this Court. P. 323.
3. Where questions were certified to this Court in a case appealed to the Court of Appeals of the District of Columbia which, under the Expediting Act of 1903, should have been appealed directly here, this Court, by ordering up the entire record, acquired jurisdiction as fully as if a formal transfer had been made. P. 323.
4. The Supreme Court of the District of Columbia has power to administer relief under the Anti-Trust Act (*Federal Trade Comm.* v. *Klesner,* 274 U. S. 145); and where the suit is one under § 4, which can only be brought in equity, it is properly brought in that court sitting in Equity, and need not be addressed to it at special term as the "District Court of the United States." P. 324.
5. In a suit by the Government to restrain alleged violations of the Anti-Trust Act, defendants denied material allegations of the bill, but consented to the entry without any proof or finding of facts, of a decree granting comprehensive relief under the bill but declaring that defendants maintained the truth of their answers, asserted their innocence, and consented to the entry of the decree upon condition that their consent should not constitute an admission, nor the decree an adjudication, that they, or any of them, had violated any law of the United States. *Held:*

   (1) That a motion by the defendants to vacate the consent decree could not be sustained upon the ground that there was no case

or controversy to afford jurisdiction, since (a) an injunction may issue to prevent future wrongs though no right has yet been violated; and (b) because, if the court, having jurisdiction of the subject and the parties, erred in deciding that there was a controversy, the error could have been reached only by bill of review or appeal. P. 325.

(2) A motion to vacate would not lie upon the ground that the facts necessary to constitute a violation conferring jurisdiction under the Anti-Trust Act were neither admitted nor proved, since an injunction limited to future acts might be based upon allegations of the bill not specifically denied. Error in that regard would not go to the jurisdiction, and besides being of a kind reviewable only by appeal, was in this case waived by consent to the decree. P. 327.

(3) Prohibitions in an injunction decree, which standing alone are too general, are to be read with other parts of the decree and with allegations of the bill, for the purpose of removing uncertainties. P. 327.

(4) Provisions of the consent decree cannot be assailed by a motion to vacate upon the ground that they enjoin future conduct in terms too vague and general. P. 327.

(5) Nor upon the ground that defendants are debarred in the future from lawful lines of business not connected by any finding of facts with the conspiracy charged; since consent to entry of the decree without such findings left power in the court to construe the pleadings and therein to find circumstances of danger justifying such prohibitions. P. 328.

(6) Even if the consent decree contain prohibitions which are contrary to the Anti-Trust Act and the common law, and are grossly erroneous, it is not therefore void. P. 330.

(7) If the court, in addition to enjoining the acts that were admittedly interstate, enjoined some that were wholly intrastate and in no way related to the conspiracy to obstruct interstate commerce, it erred; and had the defendants not waived such error by their consent, they might have had it corrected on appeal. But the error, if any, does not go to the jurisdiction of the court. P. 330.

(8) The consent of the Attorney General to the decree, whether correctly or erroneously given, was within his official discretion. P. 331.

Supreme Court of the District of Columbia, affirmed.

REVIEW of orders of the Supreme Court of the District of Columbia, overruling motions of Swift & Company and other defendants seeking to vacate a decree which had been entered by consent in a suit brought by the Government under the Anti-Trust Law. The matter went first, by appeal, to the Court of Appeals of the District of Columbia and became lodged in this Court by an order calling up the entire record after that court had certified certain questions concerning it.

Mr. Charles E. Hughes, with whom *Messrs. Charles A. Douglas, Conrad H. Syme, Henry Veeder,* and *Charles J. Faulkner, Jr.,* were on the brief, for Swift & Company et al.

The motions to vacate are independent proceedings. *Stevirmac Co.* v. *Dittman,* 245 U. S. 210. The order of May 1, 1925, of the Supreme Court of the District of Columbia is final. This appeal was properly prosecuted to the Court of Appeals of the District of Columbia.

The decree contains no provisions which constitute a determination that the defendants had committed any acts which constituted a violation of law. Under what possible theory could any court without having found that there had ever been a violation of the anti-trust laws or any attempt to do the acts forbidden by the statute have enjoined the defendants, corporate or individual, or both, from pursuing the lawful occupations of life. This Court has held that no such thing could legally be done. *United States* v. *U. S. Steel Corp.,* 251 U. S. 417; *United States* v. *Coffee Exchange,* 263 U. S. 611; *Hamburg-American* case, 239 U. S. 475.

Can the Government possibly go into court with no violation of law, with no contract, combination or conspiracy in restraint of trade existing, with no monoply or attempt to monopolize existing, and with the stipula-

tion that none of these things should be found or considered to exist, and secure an injunction to prevent corporations and individuals from exercising their inherent right in present and future to pursue the lawful occupation of buying, selling and transporting in interstate and foreign commerce, and from engaging in vocations which were not even the subject of such commerce, as was done in this case, upon the mere "expectation" that the law, which had not been violated or attempted to be violated, might be violated in the future?

The theory that the Government can legally control, regulate and restrain the business activities of its citizens beyond the limits fixed by law, through the means of decrees of the federal courts secured by consent of the parties, amounts to the proposition that consent of the parties can confer jurisdiction upon the federal courts, and is fraught with serious consequences.

The decree is void for want of factual basis. The jurisdictional facts necessary to give an equity court jurisdiction were not established. *United States* v. *Swift,* 188 Fed. 92; *United States* v. *Patterson,* 201 Fed. 697; *Palmer* v. *Fleming,* 1 App. D. C. 528; *United States* v. *Reading Co.,* 183 Fed. 427. See also *United States* v. *Whiting,* 212 Fed. 466; *Alldredge* v. *Aldredge,* 151 Pac. 311; 15 R. C. L. 896.

Consent cannot confer jurisdiction to act outside the judicial power. *Swift & Co.* v. *Memphis Cold Storage Co.,* 158 S. W. 480; *T. St. L. & N. O. R. R. Co.* v. *R. R. Co.,* 208 Ill. 623; *Pittsburgh, C. & St. L. Ry. Co.* v. *Ramsey,* 22 Wall. 322.

Proof or admission of facts supporting the charges or attempted charges in the petition which were specifically denied in the answers was not made, and cannot be presumed in the face of the conditions (expressed in the stipulation and in the decree itself) upon which the parties consented that the decree should be entered. Every

judgment or decree must be supported by facts necessary to its validity. *Wood* v. *Cox,* 113 Atl. 501; *Black* v. *Keiley,* 23 N. J. Eq. 538; *Grob* v. *Cushman,* 45 Ill. 119.

There was no proof of any threatened violations. All allegations of threatened violations were denied. The stipulation is the only basis of the decree and the decree negatives any determination of any violation. What is a threatened violation of the Sherman Act? It is nothing more nor less than an attempt; and attempts to do the acts forbidden by the statute are themselves violations of the law. Facts disclosing such attempts must be charged and proved or admitted, and must be adjudicated to be violations of law before the court can enter its judgment. *United States* v. *Coffee Exchange,* 263 U. S. 611; *United States* v. *U. S. Steel Corp'n,* 251 U. S. 417; *United States* v. *Hamburg Amerikanische Co.,* 239 U. S. 466; *United States* v. *Quaker Oats Co.,* 232 Fed. 499; *In re Greene,* 52 Fed. 104.

The injunction orders contained in paragraphs 1 and 9 are void, being merely general injunctions against all possible breaches of the Anti-Trust Laws, and beyond the power of the court. *Swift & Co.* v. *United States,* 196 U. S. 375.

The injunction orders contained in paragraphs 2 to 8, inclusive, are void because they enjoin the defendants not merely from engaging in unlawful acts, but also from severally following lawful occupations in a lawful manner and are, therefore, a usurpation by the judicial branch of the Government of the function of the legislative branch. *United States* v. *Coffee Exchange,* 263 U. S. 611; *Daniel* v. *Portland Gold Mining Co.,* 202 Fed. 637; *American Federation of Labor* v. *Buck's Stove Co.,* 33 App. D. C. 83; 219 U. S. 58.

See also *Geddes* v. *Anaconda Copper Co.,* 254 U. S. 590, where it is said: "It is now the settled law that the remedies provided by the Anti-Trust Act of July 2,

1890, ... for enforcing the rights created by it are exclusive."

No department of the Government may invade the province of the others. *Massachusetts* v. *Mellon,* 262 U. S. 447.

The decree is void because it is not confined to interstate commerce, but enjoins defendants from doing acts and things which are exclusively intrastate commerce or which may be limited to intrastate commerce. *Kidd* v. *Pearson,* 128 U. S. 1; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Delaware, L. & W. R. Co.* v. *Yurkonis,* 220 Fed. 429.

The decree is void because by it defendants are obliged to go out of certain businesses and not to enter others in the United States, forever, which is violative of both the common law and the Anti-Trust statutes.

The decree is void because there was no "case" or "controversy" before the court within the meaning of § 2 of Article III of the Constitution. *Osborn* v. *United States Bank,* 9 Wheat. 737; *Smith* v. *Adams,* 130 U. S. 167; Story on the Constitution, 4th Ed., § 1646; *In re Pacific Ry. Comm.,* 32 Fed. 241.

It is elementary that "the controversy, in a suit, is the one actually presented by the pleadings, and not what it might have been." *Vulcan Detinning Co.* v. *American Can Co.,* 130 Fed. 635.

Consent could not confer jurisdiction where there was no "case" or "controversy," within the meaning of the Federal Constitution. *Little* v. *Bowers,* 134 U. S. 547; *California* v. *San Pablo R. Co.,* 149 U. S. 308; *Muskrat* v. *United States,* 219 U. S. 346; *Torrence* v. *Shedd,* 144 U. S. 527; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70.

The Attorney General was without power to consent to the decree. The Attorney General has not only no authority to impose decrees upon citizens which are not authorized by law, but it is the duty of the courts to set

aside any such decree, imposed either by consent or otherwise. Even where a court has jurisdiction over the parties and the subject-matter, yet if it makes a decree which transcends the limits of its authority, such decree is not merely erroneous, but void. Freeman on Judgments, 4th Ed. § 116. See also Black on Judgments, 2d Ed. § 171; *Windsor* v. *McVeigh,* 93 U. S. 274; *United States* v. *Walker,* 109 U. S. 258; *United States* v. *American Tobacco Co.,* 191 Fed. 371; *Reynolds* v. *Stockton,* 140 U. S. 254; 33 C. J. 1076; 15 R. C. L. "Judgments," §§ 316 and 144; 2 High on Injunctions, 4th Ed. Par. 1425; *Pyeatt* v. *Estes,* 4 A. L. R. 1570; *Sache* v. *Gillette,* 11 L. R. A. (N. S.) 803; *Glover* v. *Brown,* 184 Pac. 649; *Munday* v. *Vail,* 43 N. J. L., 418; Black on Judgments, 2d Ed. § 242; *Johnson* v. *McKinnon,* 13 L. R. A. (N. S.) 874; *American Mortgage Co.* v. *Thomas,* 47 Fed. 550.

A motion to vacate filed in the court which rendered the decree is the proper procedure to have a void decree vacated. 21 C. J. 718. See also *Grant* v. *Harrell,* 109 N. C. 78; *Aronson* v. *Sire,* 85 App. Div. (N. Y.) 607; Freeman on Judgments, 5th Ed., §§ 228, 273, 307 and 382.

Assistant to the Attorney General Donovan, with whom *Solictor General Mitchell* and *Mr. H. B. Teegarden,* Special Assistant to the Attorney General, were on the brief, for the United States.

It is suggested that the judgment refusing to grant the motion to vacate the decree was a decree in a suit under the Sherman Act, within the meaning of the Expediting Act, and the appeal should have been direct to this Court; that the Act providing for transfer of cases from Circuit Courts of Appeals, literally construed, did not allow transfer from the Court of Appeals of the District of Columbia, but liberally construed did; that unless this Court concludes that appeal was properly taken to the

Court of Appeals of the District, or, if not so taken, that the cause was thereupon transferable to this Court, it has not, by ordering the whole record up after certificate, acquired jurisdiction to consider the merits.

The Government admits the full force of the clause in the decree's preamble as a refusal to adjudicate any past violations of law, but answers that it does not touch the factual basis necessary to support the decree; the decree rests upon a threatened or impending future violation of the Anti-Trust Law; the finding of a state of facts to support it is conclusively presumed by the entry of the decree upon the parties' consents, and is not denied by any language of the decree. The Government denies that any of the provisions of the decree are beyond the jurisdictional power of the court to enter. The bill placed before the court a controversy upon a subject matter within its jurisdiction; the parties voluntarily submitted themselves to the jurisdiction; the relief granted was of a nature (injunctive) within the court's equity powers to grant, and its provisions are all within the scope of the case made by the bill; the parties consented to the decree, thereby adopting its language as their own, conceding its appropriateness to the situation complained of, and waiving any errors of substance or form.

Mr. William C. Breed, with whom *Messrs. Sumner Ford* and *Edward A. Craighill, Jr.,* were on the brief, for the National Wholesale Grocers Association.

Mr. Edgar Watkins, with whom *Mr. Mac Asbill* was on the brief, for the American Wholesale Grocers Association at the first hearing only.

Mr. Justice Brandeis delivered the opinion of the Court.

This case presents the question whether the consent decree entered February 27, 1920, with a view to prevent-

ing a long feared monopoly in meat and other food products is void.[1]

On that day the United States filed in the Supreme Court of the District of Columbia, sitting in equity, a petition under § 4 of the Sherman Anti-Trust Act, July 2, 1890, c. 647, 26 Stat. 209, to enjoin violations of that statute and of the Clayton Act, October 15, 1914, c. 323, 38 Stat. 730, 736. It named as defendants the five leading packers; namely, Swift & Company, Armour & Company, Morris & Company, Wilson & Company (Inc.), and the Cudahy Packing Company. And it joined with them 80 other corporations and 50 individuals, all but four of whom were associated with some one of the five defendants above named. The petition charged the defendants with attempting to monopolize a large proportion of the food supply of the nation and with attempting to extend the monopoly by methods set forth. It stated that the purpose of the suit was to put an end to the monopoly described and to deprive the defendants of the instrumentalities by which they were perfecting their attempts to monopolize. It sought a comprehensive injunction and also the divestiture of the instrumentalities described.

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[1] See *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Armour & Co.*, 142 Fed. 808; *Stafford* v. *Wallace*, 258 U. S. 495; Report of the Select Committee on the Transportation and Sale of Meat Products, 51st Cong., 1st Sess., Sen. Rep. No. 829; Report of the Commissioner of Corporations on the Beef Industry, 58th Cong., 3d Sess., H. R. Doc. No. 382; Message from the President of the United States transmitting Summary of Report of the Federal Trade Commission on the Meat Packing Industry, 65th Cong., 2d Sess., H. R. Doc. 1297; Report of the Federal Trade Commission on the Meat Packing Industry, 1918-1920; Report of the Federal Trade Commission on Private Car Lines, 1919. See also Hearings before the Committee on Agriculture of the House of Representatives, 66th Cong., 2d Sess., pp. 2309–2357; Letter from the Attorney General, 68th Cong., 1st Sess., Sen. Doc. No. 61; Letter from the Chairman of the Federal Trade Commission, 68th Cong., 2d Sess., Sen. Doc. No. 219.

Simultaneously with the filing of the petition, all the defendants filed answers which denied material allegations of the bill. There was filed at the same time a stipulation, signed by all the parties to the suit, which provided that the court might, without finding any fact, enter the proposed decree therein set forth. On the same day a decree in the form so agreed upon was entered. To this decree all parties filed assents. In its opening paragraph, the decree embodied a clause of the stipulation to the effect that while the several corporations and individual defendants "maintain the truth of their answers and assert their innocence of any violation of law in fact or intent, they nevertheless, desiring to avoid every appearance of placing themselves in a position of antagonism to the Government, have consented and do consent to the making and entry of the decree now about to be entered without any findings of fact, upon condition that their consents to the entry of said decree shall not constitute or be considered an admission, and the rendition or entry of said decree, or the decree itself, shall not constitute or be considered an adjudication that the defendants or any of them have in fact violated any law of the United States."

The decree declared, among other things, that the court had jurisdiction of the persons and the subject matter; and "that the allegations of the petitioner state a cause of action against the defendants under the provisions" of the Sherman Anti-Trust Act and supplementary legislation. It granted comprehensive relief in accordance with the prayer of the bill. The details will be discussed later. The decree closed with this provision: "Eighteenth. That jurisdiction of this cause be, and is hereby, retained by this court for the purpose of taking such other action or adding at the foot of this decree such other relief, if any, as may become necessary or appro-

priate for the carrying out and enforcement of this decree and for the purpose of entertaining at any time hereafter any application which the parties may make with respect to this decree."

None of the original parties to the suit made any application to the court between the date of the entry of the consent decree and November 5, 1924; but three intervening petitions were filed—that of the Southern Wholesale Grocers' Association, allowed September 10, 1921; that of the National Wholesale Grocers' Association, allowed November 5, 1921; and that of the California Cooperative Canneries, allowed September 13, 1924, see 299 Fed. 908. On November 5, 1924, two motions to vacate the decree were filed in the cause. One was by Swift & Company and the subsidiary corporations and individual defendants associated with it; the other by Armour & Company and the subsidiary corporations and individual defendants associated with it. The allegations of the two motions were identical; and each prayed that the consent decree be declared void. The grounds of invalidity relied upon will be stated later. On May 1, 1925, the two motions to vacate the consent decree were overruled. From the order overruling them, Swift & Company and Armour & Company, with their respective associates, took appeals to the Court of Appeals of the District of Columbia.

On May 28, 1926, the United States filed in that court a motion to dismiss the appeals for want of jurisdiction, contending that an appeal lay only directly to this Court. On January 3, 1927, the Court of Appeals of the District entered an order dismissing the appeals. Promptly thereafter, Swift & Company, Armour & Company, and their respective associates, moved that court to stay the mandate and to transfer the appeals to this Court, pursuant to the Act of September 14, 1922, c. 305, 42 Stat. 837, incorporated in the Judicial Code as § 238(a). On

January 31, 1927, the Court of Appeals vacated its opinion and order, and restored the case for reargument upon the question of its jurisdiction of the appeals and for argument on its jurisdiction to transfer the appeals to this Court. Thereafter, having heard argument, the Court of Appeals certified five questions to this Court, under § 251 of the Judicial Code as existing prior to the Act of February 13, 1925, c. 229, 43 Stat. 936. On October 17, 1927, this Court, having heard argument on the certificate, ordered that the entire record in the cause be sent here, as provided in the same section. On that record the case is before us. Many questions are presented.

An objection of the Government to the jurisdiction of this Court must first be considered. The Expediting Act of February 11, 1903, c. 544, 32 Stat. 823, U. S. C., Title 15, § 29, provides that from a final decree in a suit in equity brought by the Government under the Anti-Trust Act, an appeal lies only directly to this Court. The Government suggests that under the Expediting Act no appeal lay to the Court of Appeals from the order denying the motion to vacate; that the Court of Appeals consequently was powerless to certify questions relating to the merits; that this Court by ordering up the record, as provided in § 251 of the Judicial Code, did not acquire jurisdiction to decide questions which could not lawfully have been certified under that section; that the case may not be treated as here on transfer, because the Court of Appeals of the District is not a circuit court of appeals within the meaning of the Act of 1922; and that this Court is therefore without power to pass on the merits of the cause. Swift and Armour answer that the motions to vacate the consent decree are not subject to the provisions of the Expediting Act because they are not a part of the suit filed February 27, 1920, under the Anti-Trust Act, but constitute a new suit. Compare *Stevirmac Oil*

& Gas Co. v. *Dittman,* 245 U. S. 210. The argument is that the original suit ended with the entry of the consent decree, or at all events, at the expiration of the term, or at the end of the 60 days from the entry of the decree allowed by the Expediting Act for an appeal. We need not enquire whether an independent suit to set aside a decree entered under the Anti-Trust Act is subject to the provisions of the Expediting Act. The consent decree provided by paragraph Eighteenth for "entertaining at any time hereafter any application which the parties may make with respect to this decree." Swift and Armour made these motions to vacate in the original suit; they arose out of the three proceedings for intervention filed after entry of the consent decree; and they were entitled in the original cause.

The Court of Appeals of the District was, therefore, without jurisdiction to entertain the appeals. We think, however, that it was a circuit court of appeals within the meaning of the Transfer Act; and, as the judgment appealed from was entered before the effective date of the Act of February 13, 1925, the appeals should have been transferred to this Court. Compare *Pascagoula National Bank* v. *Federal Reserve Bank,* 269 U. S. 537; *Salinger* v. *United States,* 272 U. S. 542, 549; *Rossi* v. *United States,* 273 U. S. 636; *Timken Roller Bearing Co.* v. *Pennsylvania R. R. Co.,* 274 U. S. 181, 186. The want of a formal order of transfer would not have been fatal to our taking jurisdiction of the whole case, had it come before us on writ of error or appeal. *Wagner Electric Manufacturing Co.* v. *Lyndon,* 262 U. S. 226, 231; *Waggoner Estate* v. *Wichita County,* 273 U. S. 113, 116. It is no more so now, when we have required the record to be sent up to us. We treat the case as here.

The decree sought to be vacated was entered with the defendants' consent. Under the English practice a consent decree could not be set aside by appeal or bill of

review, except in case of clerical error. *Webb* v. *Webb*, 3 Swanst. 658; *Bradish* v. *Gee*, 1 Amb. 229; Daniell, Chancery Practice, 6th Am. ed., *973-974. In this Court a somewhat more liberal rule has prevailed. Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered, *Pacific R. R. Co.* v. *Ketchum*, 101 U. S. 289, 295; *White* v. *Joyce*, 158 U. S. 128, 147; or of fraud in its procurement, *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451; or that there was lack of federal jurisdiction because of the citizenship of the parties. *Pacific R. R. Co.* v. *Ketchum*, *supra*. Compare *Fraenkl* v. *Cerecedo*, 216 U. S. 295. But "a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause." *Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States*, 113 U. S. 261, 266. Compare *United States* v. *Babbitt*, 104 U. S. 767; *McGowan* v. *Parish*, 237 U. S. 285, 295. Where, as here, the attack is not by appeal or by bill of review, but by a motion to vacate, filed more than four years after the entry of the decree, the scope of the enquiry may be even narrower. Compare *Kennedy* v. *Georgia Bank*, 8 How. 586, 611-612. It is not suggested by Swift and Armour that the decree is subject to infirmity because of any lack of formal consent, or fraud, or mistake. But eight reasons are relied on as showing that, in whole or in part, it was beyond the jurisdiction of the court.

First. At the time the questions were certified, there was a contention that the Supreme Court of the District lacked jurisdiction of the subject matter, because it is not a district court of the United States within the meaning of the Anti-Trust Act. After entry of the case in this Court, that contention was disposed of by *Federal Trade Commission* v. *Klesner*, 274 U. S. 145. Now, it is conceded that the Supreme Court of the District has power

to administer relief under the Anti-Trust Act; but the claim is made that in this proceeding it was without jurisdiction, because the petition was addressed to the "Supreme Court of the District of Columbia, sitting in equity," instead of to the special term of that court "as the District Court of the United States." The argument has compelled enquiry into legislation affecting the courts of the District, enacted from time to time during a long period. It would not be profitable to discuss the details of the legislation. We are of opinion that this suit under § 4 of the Anti-Trust Act, which could only have been brought in a court of equity, was properly brought in the Supreme Court of the District, sitting in equity. This conclusion has support in established practice in analogous cases.[2]

Second. It is contended that the Supreme Court lacked jurisdiction because there was no case or controversy within the meaning of § 2 of Article III of the Constitution. Compare *Lord* v. *Veazie,* 8 How. 251; *Little* v. *Bowers,* 134 U. S. 547; *South Spring Hill Gold Mining Co.*

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[2] Suits in equity under Revised Statutes, § 4921, to enjoin patent infringements, like suits in equity under the Anti-Trust Acts, are entertained by the Supreme Court of the District solely by virtue of its general powers as a District Court of the United States. Revised Statutes, § 629(9); Act of March 3, 1911, c. 231, 36 Stat. 1087, 1167. These are commonly brought, as was the case at bar, in the equity term. See the original papers in *Krupp* v. *Crozier,* 32 App. D. C. 1; *Boynton* v. *Taggart,* 40 App. D. C. 82; *Tabulating Machine Co.* v. *Durand,* 38 Wash. L. R. 552; *Comptograph Co.* v. *Adder Machine Co.,* 41 App. D. C. 427; *Hutchison Vapor Heating Corporation* v. *Mouat,* 48 App. D. C. 388. In *United States* v. *Baltimore & Ohio R. R. Co.,* 26 App. D. C. 581, it was held that a suit to collect penalties for violation of the Safety Appliance Act might be brought in the circuit term of the Supreme Court of the District, though the Act provided for the bringing of suits "in the district court of the United States having jurisdiction in the locality where such violation shall have been committed." Act of March 2, 1893, c. 196, 27 Stat. 531, 532

v. *Amador Medean Gold Mining Co.*, 145 U. S. 300; *California* v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308. The defendants concede that there was a case at the time when the Government filed its petition and the defendants their answers; but they insist that the controversy had ceased before the decree was entered. The argument is that, as the Government made no proof of facts to overcome the denials of the answers, and stipulated both that there need be no findings of fact and that the decree should not constitute or be considered an adjudication of guilt, it thereby abandoned all charges that the defendants had violated the law; and hence the decree was a nullity. The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated. *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 536. Moreover, the objection is one which is not open on a motion to vacate. The court had jurisdiction both of the general subject matter—enforcement of the Anti-Trust Act—and of the parties. If it erred in deciding that there was a case or controversy, the error is one which could have been corrected only by an appeal or by a bill of review. Compare *Pacific R. R. Co.* v. *Ketchum*, 101 U. S. 289, 297. On a motion to vacate, the determination by the Supreme Court of the District that a case or controversy existed is not open to attack. Compare *Cameron* v. *M'Roberts*, 3 Wheat. 591; *McCormick* v. *Sullivant*, 10 Wheat. 192, 199; *Kennedy* v. *Georgia Bank*, 8 How. 586, 611-612; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 557; *Dowell* v. *Applegate*, 152 U. S. 327; *Cutler* v. *Huston*, 158 U. S. 423, 430; *New Orleans* v. *Fisher*, 180 U. S. 185, 196; *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207.

Third. It is contended that the consent decree was without jurisdiction because it was entered without the support of facts. The argument is that jurisdiction under the Anti-Trust Acts cannot be conferred by consent; that jurisdiction can exist only if the transactions complained of are in fact violations of the Act; that merely to allege facts showing violation of the anti-trust laws is not sufficient; that the facts must also be established according to the regular course of chancery procedure; that this requires either admission or proof; and that, here, there was no admission but, on the contrary, a denial of the allegations of the bill, and a recital in the decree that the defendants maintain the truth of their answers, assert their innocence, and consent to the entry of the decree without any finding of fact, only upon condition that their consent shall not constitute or be considered an admission. The argument ignores both the nature of injunctions, already discussed, and the legal implications of a consent decree. The allegations of the bill not specifically denied may have afforded ample basis for a decree limited to future acts. *Deputron* v. *Young,* 134 U. S. 241, 250–251. If the court erred in finding in these allegations a basis for fear of future wrong sufficient to warrant an injunction, its error was of a character ordinarily remediable on appeal. Such an error is waived by the consent to the decree. *United States* v. *Babbitt,* 104 U. S. 767; *McGowan* v. *Parish,* 237 U. S. 285, 295. Clearly it does not go to the power of the court to adjudicate between the parties. *Voorhees* v. *Bank of the United States,* 10 Pet. 449; *Cooper* v. *Reynolds,* 10 Wall. 308; *Christianson* v. *King County,* 239 U. S. 356, 372.

Fourth. It is contended that even if the decree is not void as a whole, parts of it must be set aside as being in excess of the court's jurisdiction. This is urged in respect to the first and the ninth paragraphs, which are said to

be too vague and general. The first enjoins the corporation defendants from "in any manner maintaining or entering into any contract, combination, or conspiracy . . . in restraint of trade or commerce among the several States, or from . . . monopolizing or attempting to monopolize . . . any part of such trade or commerce." The ninth enjoins the corporation defendants from "using any illegal trade practices of any nature whatsoever in relation to the conduct of any business in which they or any of them may be engaged." It is insisted that, as a court's power is limited to restraining acts which violate or tend to violate laws, the acts to be enjoined must be set forth definitely; and that these paragraphs are so general in terms as to make the defendants liable to proceedings for contempt if they commit any breach of the law. The paragraphs, if standing alone, might be open on appeal to the objection that they are too general to be sanctioned. Compare *Swift & Co.* v. *United States,* 196 U. S. 375, 396, 401. But they do not stand alone. They are to be read in connection with other paragraphs of the decree and with the allegations of the bill. *Barnes* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 122 U. S. 1, 14; *City of Vicksburg* v. *Henson,* 231 U. S. 259, 269. When so read, any uncertainties are removed. Moreover, the defendants by their consent lost the opportunity of raising the question on appeal. Obviously the generality of a court's decree does not render it subject to a motion to vacate.

Fifth. It is contended that paragraphs second to eighth of the decree are void because of their comprehensiveness. These paragraphs enjoin the defendants from holding directly or indirectly (without the consent of the court) any interest in any public stockyard, or any stockyard terminal railroad, or any stockyard market journal published in the United States; and enjoin the defendants, except as there provided, from engaging or being interested in

the business of manufacturing, buying, selling or handling any one of 114 enumerated food products or any one of 30 other named articles of commerce; from selling meat at retail; from selling milk or cream; from holding any interest in any public cold storage plant; from using their distributive systems (including branch houses, refrigerator cars, route cars, and auto trucks) in any manner for the purpose of handling any of the many articles above referred to; and from having more than a half interest in or control of any business engaged in manufacturing, jobbing, selling, transporting, or delivering any one of most of the articles above referred to.

The argument is that the power to issue an injunction is limited by the scope of the transactions prohibited by §§ 1, 2 and 3 of the Anti-Trust Act; that the defendants are here enjoined, not only from remaining in these lawful businesses named, but also from ever re-entering them; that none of these "unrelated" lines of business are unlawful in themselves; that none can be restrained unless, by a finding of the essential facts, the connection with the conspiracy is established; that no such facts have been found; that the parties cannot by consent confer jurisdiction to issue an injunction broader than the facts warrant; and that an injunction so broad as that entered involves usurpation by the judicial branch of the Government of the function of Congress. Compare *United States* v. *New York Coffee & Sugar Exchange,* 263 U. S. 611, 621. Here again, the defendants ignore the fact that by consenting to the entry of the decree, "without any findings of fact," they left to the court the power to construe the pleadings, and, in so doing, to find in them the existence of circumstances of danger which justified compelling the defendants to abandon all participation in these businesses, to divest themselves of their interest therein, and to abstain from acquiring any interest hereafter.

Sixth. The defendants make a further contention concerning paragraphs second to eighth, which differs little from that just answered. It is urged that the decree is void, because it obliges the defendants to abandon completely certain businesses which are inherently lawful and forbids them from entering into other businesses which may be lawfully conducted; and that to do this is not merely unauthorized by, but is contrary to, the common law and the Anti-Trust Act. Compare *Nordenfelt* v. *Maxim Nordenfelt Co.*, [1894] A. C. 535; *United States* v. *Addystone Pipe & Steel Co.*, 85 Fed. 271. But the court had jurisdiction of the subject matter and of the parties. And even gross error in the decree would not render it void. Compare *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 18; *In re Coy*, 127 U. S. 731, 756.

Seventh. It is contended that the decree is void because the injunction is not limited to acts in interstate commerce. This objection is in essence like the two preceding ones. The argument is that each of the businesses named in paragraphs second to eighth is susceptible of being carried on in intrastate commerce alone; that some of these businesses, for instance retail meat markets, are distinctly intrastate in character; that there was no finding of an interweaving of intrastate and interstate transactions as in *United States* v. *New York Central R. R. Co.*, 272 U. S. 457, 464, or that the intrastate transactions had any relation to interstate operations, as in *Swift & Co.* v. *United States*, 196 U. S. 375, 397, and *Stafford* v. *Wallace*, 258 U. S. 495; and that, therefore, the prohibition of intrastate transactions was an overstepping of federal powers which renders the decree a nullity. Again, the argument fails to distinguish an error in decision from the want of power to decide. The allegations of a conspiracy to obstruct interstate commerce brought the case within

the jurisdiction of the court. *The Fair* v. *Kohler Die Co.*, 228 U. S. 22; *Binderup* v. *Pathé Exchange*, 263 U. S. 291, 304; *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 608. Compare *Chicago, Rock Island & Pacific Ry. Co.* v. *Schendel*, 270 U. S. 611, 616–617. If the court, in addition to enjoining acts that were admittedly interstate, enjoined some that were wholly intrastate and in no way related to the conspiracy to obstruct interstate commerce, it erred; and had the defendants not waived such error by their consent, they might have had it corrected on appeal. But the error, if any, does not go to the jurisdiction of the court. The power to enjoin includes the power to enjoin too much. Compare *Fauntleroy* v. *Lum*, 210 U. S. 230.

Eighth. Finally, it is urged that the decree is void, because the Attorney General had no power to agree to its entry. Compare *Kelly* v. *Milan*, 127 U. S. 139, 159. The argument is that the utmost limit of his authority was to agree to a decree which would prohibit the defendants from doing specific acts which constitute contracting, combining, conspiring or monopolizing in violation of the anti-trust law; that he was without authority to enter into a contract by which citizens of the United States were prohibited absolutely and forever from engaging in the lawful business of conducting stockyards, storage warehouses, or the manufacture and distribution of many named food and other products, and by which many corporations and individuals would be forever taken out of the field of competition with others engaged in the same lines of business. Whether it would follow that the defendants are entitled to have the decree vacated because of such lack of authority, we need not decide. For we do not find in the statutes defining the powers and duties of the Attorney General any such limitation on the exercise of his discretion as this contention involves. His

authority to make determinations includes the power to make erroneous decisions as well as correct ones. Compare *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 278–280; *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165; *Kern River Co.* v. *United States*, 257 U. S. 147, 155; *Ponzi* v. *Fessenden*, 258 U. S. 254, 262.

Affirmed.

MR. JUSTICE SUTHERLAND and MR. JUSTICE STONE took no part in the consideration or decision of this case.

NIGRO *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 600. Argued January 11, 12, 1928.—Decided April 9, 1928.

1. In § 2 of the Anti-Narcotic Act, as amended, which provides that it shall be unlawful for "any person" to sell, etc., any of the drugs specified in the first section except in pursuance of a written order of the person to whom the article is sold, etc., on a form issued by the Commissioner of Internal Revenue, the words "any person" include all persons and not merely those who by § 1 are required to register and pay the tax. P. 340.
2. So construed, the provision is constitutional. P. 351.
3. The Act, as amended February 24, 1919, is a genuine taxing act. P. 352.
4. The provision in question, being reasonably adapted to enforcement of the tax, is not an undue invasion of the police power of the States; and an incidental motive to discourage harmful uses of the drugs taxed would not make it so. P. 353.

RESPONSE to questions certified by the Circuit Court of Appeals relative to the conviction of Nigro for selling morphine without a written order from the purchaser on an official form.

Mr. Wm. G. Lynch, with whom *Mr. Harvey Roney* was on the brief, for Nigro.

Congress intended that those persons who came within the classes named and defined should be required to register and pay the special tax, and none other.

If this construction be correct, then, if § 2 be construed as including all persons in the United States, it is unconstitutional under the doctrine laid down in *United States* v. *Jin Fuey Moy,* 241 U. S. 394. That case and this are parallel, at least insofar as the principle is concerned, that the Harrison Narcotic Act is a revenue measure and can only be applied to those who are required to register and pay the special tax. It is only from those persons that the Government can derive any revenue by means of registration, and the only constitutional authority which Congress has is to enact such a law for revenue. *Wong Sing* v. *United States,* 260 U. S. 18.

The statute, as said in the *Jin Fuey Moy* case, does not purport to be in execution of any treaty. If it did, then, as this Court there remarked, another grave question would arise. *Doremus* v. *United States,* 249 U. S. 86.

The *Doremus* case arose under the original Act and is not applicable to the first section of that Act as amended by the Act of February 24, 1919. Under the amended Act only certain persons are allowed or required to register, and only such persons are penalized for doing any of the things in relation to the drugs which would require them to register, and if § 2 is construed to apply to all persons, then it goes beyond § 1 as amended, and it cannot assist in the collection of the revenue. The provision in § 2, that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared, &c., and the provision that no collector shall sell any such forms to any person other

than a person who has registered and paid the special tax as required by § 1, and the provision that it shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business, and the provision that no sales can be made except upon order forms, or upon a physican's prescriptions, or to certain governments purchasing them for the health service, army, navy, etc., show plainly that the purpose of Congress in enacting § 2 was to confine the drugs to their use as medicine. When the restrictions and conditions Congress attached to the sale and distribution of the drugs under § 2 are carefully considered, it is clearly seen that Congress had in mind the stamping out of drug addiction, and thereby to subserve the health and general welfare of the people of the United States. If § 2 covers all persons within the United States, then it was not merely incident to the raising and protection of the revenue, because all persons within the United States were not required to pay it; and unless it is restricted to those who are required to pay it, then, as to all other persons, it is necessarily unconstitutional and void.

If Congress by § 2 intended only to aid the collection of the revenue, why would it not permit persons who had not registered to procure order forms and purchase the drugs upon them, or upon a physician's prescription? By limiting and conditioning the sale of the drugs as it did, and limiting the use of the drugs to medicine, it is manifest that the moral rather than the revenue end was in view.

The public health and morals are subjects reserved to the several States and to the people, as provided by the Tenth Amendment. *United States* v. *Daugherty,* 269 U. S. 360; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child*

Labor Tax Case, 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; *Linder* v. *United States,* 268 U. S. 5; *United States* v. *One Ford Coupe,* 272 U. S. 321, 350.

Solicitor General Mitchell, with whom *Messrs. O. R. Luhring,* Assistant Attorney General, and *Harry S. Ridgely,* Attorney in the Department of Justice, were on the brief, for the United States.

The prohibition contained in § 2 of the Narcotic Act against selling, bartering, exchanging, or giving away drugs, except in pursuance of an order form, is not limited to persons required to register, but applies to "any person."

As the Act was originally enacted in 1914, it contained no stamp tax provision. The only taxes prescribed were the occupation taxes on importers and dealers. It required every person selling or dealing in the drug, without regard to any stamp tax or stamped package, to register and pay the occupation tax, and the words "any person" in the first sentence of § 2 as originally enacted clearly provided that every person selling the drug should exact the order form from the purchaser without regard to whether or not the vendor was in fact registered. The stamp tax provisions of § 1 were added by the Revenue Act of 1918, and the registration and occupation tax provisions in § 1 were then amended so as to provide that only those who deal at wholesale or retail in or from original stamped packages are required to register and pay the dealer's occupation tax. For the first time there were created two classes of dealers—those who sell in or from stamped packages and are required to register and pay the occupation tax, and those who sell only in or from unstamped packages, every sale by whom is a violation of the stamp-tax provisions, and who are not required to register.

No change was made in § 2, and there is no reason to believe that Congress intended that a restricted meaning should be given to it as a result of the amendments to § 1.

Prior to the amendment of 1918, the words "any person" in § 2 had been literally construed to apply to sales by any person whether registered or not. *Fyke* v. *United States,* 254 Fed. 225. Section 2 had been so generally applied in other cases. When overhauling the Harrison Act by the amendments of 1918, Congress made no change in § 2. It should be presumed to have acquiesced in the construction which had been placed upon it. *Coleman* v. *United States,* 3 F. (2d) 243; *United States* v. *Jin Fuey Moy,* 241 U. S. 394.

The purpose of the order-form provisions of the Act was to keep the traffic aboveboard and enable the United States to observe all transactions in drugs. Looked at as an aid to enforcement of the two tax provisions of the statute, one imposing an occupation tax and the other a stamp tax, the purpose of the Act is defeated if a purchaser of drugs from an unregistered dealer is not required to furnish the prescribed order form.

Making it incumbent on the vendor, whether registered or not, to exact a written order on the prescribed form from the purchaser serves the purpose of the statute in enabling public authorities to observe the disposition of the drug by the purchaser and to enforce the registration, occupation tax, and stamp-tax provisions.

If Congress has power to require vendors to decline to sell to anyone not producing a written order on a prescribed form, it has power to require those not registered, as well as those registered, to follow this practice.

Section 2, broadly construed, is not unconstitutional.

The provisions imposing stamp taxes are valid. *Alston* v. *United States,* 274 U. S. 289. Those involving occupa-

tion taxes are valid, and the provisions making it unlawful to purchase or sell unstamped drugs or to deal in stamped drugs without registering or paying the occupation tax are clearly valid. The order form provisions of § 2 were sustained in *United States* v. *Doremus,* 249 U. S. 86. *United States* v. *Balint,* 258 U. S. 250.

The *Doremus* case dealt with the statute as originally enacted and sustained it as a revenue measure, although the only tax imposed by it was an annual occupation tax on purchasers, importers, and dealers of $1 each, and the revenues derived were obviously nominal, and the Act was attacked as not a genuine revenue measure. By the amendments of 1918, this weakness of the Act was repaired. The occupation taxes were made substantial, and, in addition, the stamp tax on the drugs at the rate of one cent an ounce or any fraction thereof was added. These tax provisions produce substantial revenue, and the Act, as a whole, can be sustained as a genuine tax measure.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This case comes here by certificate of the Circuit Court of Appeals of the Eighth Circuit, and is intended to submit to us, for answer, certain questions concerning the validity and proper construction of the Anti-Narcotic Act of December 17, 1914, c. 1, 38 Stat. 785, as amended in the Revenue Act of 1918, February 24, 1919, § 1006, c. 18, 40 Stat. 1057, 1130.

The Circuit Court of Appeals bases its questions on issues arising in its consideration on error of a judgment of conviction on the second count of an indictment drawn under § 2 of the Act. The count charged that one Frank Nigro and one Roy Williams unlawfully sold to one A. L. Raithel one ounce of morphine, not being sold in pursuance of a written order of A. L. Raithel on a form

issued in blank for that purpose by the Commissioner of Internal Revenue. Roy Williams was not apprehended. Frank Nigro was tried and convicted, and sentence was imposed of five years' imprisonment at the Leavenworth penitentiary. The Circuit Court of Appeals expressed the opinion that the case could not be disposed of without determining the construction and possibly the constitutionality of the first provision of § 2 of the Act, reading as follows:

"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

A summing up of the evidence, tending to show the sale of an ounce of morphine by the defendants as charged in the second count, is contained in the certificate by the court.

The questions submitted for our consideration are as follows:

QUESTION I.

Is the provision which is contained in the first sentence of section 2 of the Act limited in its application to those persons who by section 1 are required to register and pay the tax?

QUESTION II.

If a broader construction is given to said provision, is the provision as so construed, constitutional?

If question I is answered in the affirmative, then we ask,

QUESTION III.

Is it necessary for the Government in prosecuting under said provision, to allege and prove that defendant was a person required by section I to register and pay the tax?

If question III is answered in the affirmative, then we ask,

QUESTION IV.

Is the allegation that defendant made the sale not in pursuance of a written order of the buyer on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, sufficient to charge that defendant was a person required to be registered and to pay the tax under section I?

The second question was invoked by what we said in *United States* v. *Daugherty,* 269 U. S. 360, 362, as follows:

"The constitutionality of the Anti-Narcotic Act, touching which this Court so sharply divided in *United States* v. *Doremus,* 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44, 67; and *Linder* v. *United States,* 268 U. S. 5, may necessitate a review of that question if hereafter properly presented."

In *Alston* v. *United States,* 274 U. S. 289, 294, the question of the constitutionality of the Act was sought to be presented, but the case only involved the validity of § 1 as amended in the Revenue Act of 1918. We held that section valid because it imposed a stamp tax on certain narcotic drugs, making it unlawful to purchase or sell them except in or from original stamped packages, which was plainly within the taxing power of Congress and had no necessary connection with any other requirement of the Act which might subject it to reasonable question. We said that § 1 did not absolutely prohibit buying or selling; that it produced a substantial revenue and contained nothing to indicate that by colorable use of taxation Congress was attempting to invade the reserved powers of the States.

The present case relates to the validity of the second section of the law; but, before considering this, we must answer the first question and construe the meaning of the first sentence of § 2 quoted above. The controversy is whether the words "any person" in that sentence include all persons or apply only to persons who are required to register and pay the tax under the first section of the act.

We have put in the margin * a synopsis of the original § 1 of the Act of 1914, and of the same section as amended

* The original first section required every person who produced, sold, or gave away opium or coca leaves or any preparation thereof, to register with the proper internal revenue collector his name and place of business and to pay a special tax of a dollar a year, provided that no employee of such person need either register or pay, nor were officers of the General Government or of state or county or municipal governments lawfully engaged in purchasing the drugs for hospitals or prisons required to do so.

It was also provided that: "It shall be unlawful for any person required to register under the terms of this Act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section." The section provided that the word "person" used in the Act should be construed to mean and include a partnership, association or corporation as well as a natural person.

By the Revenue Act of 1918, this first part of section one is made to read as follows: "That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district, his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided." A special tax is then imposed on importers, manufacturers, producers or compounders of the drugs of $24.00 per annum, on wholesale dealers, $12.00, on retail dealers, $6.00, and on physicians entitled to administer the drugs in their professional practice, $3.00. Employees of all lawfully registered persons are exempted from tax. It is then provided that: "It shall be unlawful for any person required to reg-

in the Revenue Act of 1918, and of some other sections now in force, including § 2.

In interpreting the Act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress and must be regarded as invalid, just as the Child Labor Act of Congress was held to be, in *Bailey, Collector,* v. *Drexel Furniture Company,* 259 U. S. 20. Everything in the construction of § 2 must

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ister under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section." Then an excise revenue tax of one cent per ounce on the drug is imposed through stamps to be affixed to the bottle or other container. It is made unlawful to sell or dispense the drugs except in or from the original stamped package and possession of the drug by any person is made prima facie evidence of violation of the section. Possession of an original stamped package containing the drug is made prima facie evidence of liability to pay the tax. These presumptions are not to apply to a person obtaining the drug from a registered dealer in pursuance of a prescription written for legitimate medical uses issued by a physician or other registered practitioner and where the bottle or other container in which the drug is put up by the dealer bears the druggist's name, his serial and registry number, the number, name and address of the patient, as well as those of the writer of the prescription. The presumptions are not to apply to the dispensing of the drug to a patient by a registered physician, or practitioner in the course of his professional practice for legitimate medical purposes where a record is kept. All the provisions of existing law relating to the engraving, sale and cancellation of tax-paid stamps provided for in the internal revenue laws are made to apply to the stamps issued under the section. Unstamped packages found in possession of any person except as provided in the section are subject to seizure. Importers, manufacturers and wholesale dealers are to keep books and records and render monthly returns in relation to dealing with such drugs as are required by regulation made by the Commissioner and approved by the Secretary of the Treasury.

be regarded as directed toward the collection of the taxes imposed in § 1 and the prevention of evasion by persons subject to the tax. If the words can not be read as reasonably serving such a purpose, § 2 can not be supported.

Section 2 of the Act of 1914 was not changed by the Revenue Act of 1918. This section provides: "That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof, shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section five of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned." But § 2 is not to apply,

1. to dispensing by a registered physician in the course of his professional practice only, if he keep a record of all his dispensing except what he dispenses in personal attendance upon a patient; or
2. to dispensing of the drug to a consumer by a registered dealer on written prescription of a registered physican if dated on the day it is signed, the dealer to keep record of such prescriptions for inspection; or
3. to sale, exportation, shipment, or delivery of the drug by any person within the country for exportation under regulations; or
4. to sale or giving away any of the drug to any officer of the National Government or State, county or municipality lawfully engaged in making purchases for hospitals or prisons.

The Commissioner of Internal Revenue with the approval of the Secretary of the Treasury is to cause suitable forms to be prepared for the purposes mentioned, to be distributed to the collectors of

The importation, preparation and sale of the opiate, or other like drugs, and their transportation and concealment in small packages, are exceedingly easy and make the levy and collection of a tax thereon correspondingly

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internal revenue for sale by them, to persons who have registered and paid the special tax, and no collector is to sell any forms except to such persons. The price of these forms is to be fixed by the Commissioner of Internal Revenue as approved by the Secretary of the Treasury, but is not to exceed one dollar per hundred. When a collector shall sell forms, he is to cause the name of the purchaser to be plainly written or stamped on them before sale and delivery, and no person other than such purchaser shall use the forms so stamped to procure delivery or shipment of any such drug. It is made unlawful to obtain by means of such forms any such drug for use, sale or distribution of it, except in the conduct of a lawful business in the drug or in the legitimate practice of a medical profession.

The third section provides for returns and records to be made by registered persons.

The fourth section makes it unlawful for any non-registered person who has not paid the tax to send, ship, or deliver to any person in another State, except common carriers and employees of registered persons.

Section 5 provides for official inspection of orders, prescriptions, etc., and forbids a disclosure of information except for the enforcement of the Act.

Section 6 of the original Act was amended by the Revenue Act of 1918 and relates to minimum limitations upon strength of opium and other drugs to come within statute, but dealers in preparations that are less than minimum are to keep a record of the sale of such for inspection.

By section 7, internal revenue laws as to assessment, collection, remission and refund of internal revenue taxes are made applicable to taxes under the Act so far as not inconsistent.

By section 8, it is made unlawful "for any person not registered" under the Act, and who has not paid the special tax, to have in his possession or under his control such drugs, and his thus having them shall be presumptive evidence of a violation of this section, with the usual exemptions of employees of registered persons, and of government officers having such possession for their official duties. The section directs that the exemptions need not be negatived in an informa-

difficult. More than this, use of the drug for other than medicinal purposes leads to addiction and causes the addicts to resort to so much cunning, deceit and concealment in the procurement and custody of the drug, and to be willing to pay such high prices for it that, to be efficient, a law for taxing it needs to make thorough provision for preventing and discovering evasion of the tax—as by requiring that sales, purchases and other transactions in the drug be so conducted and evidenced that any dealing in it where the tax has not been paid, may be detected and punished and that opportunity for successful evasion may be lessened as far as may be possible.

The literal meaning of "any person," in the first line of the first sentence of § 2, includes all persons within the jurisdiction. The word "persons" is given expressly the meaning of a partnership, association or corporation, as well as that of a natural person. Why should it not be given its ordinary comprehensive significance? The argument to the contrary in favor of limiting it to exclude all but those who are required to register and pay the tax is that it would be superfluous to include persons selling opium who are not registered, because they are denounced as criminals by the first section for selling without registration. That is no reason why they may not be included under a second reasonable restriction enforceable by punishment. Of course such a restriction should be fairly adapted to obstruct the successful accomplishment of the main crime, or furnish means of detecting the guilty per-

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tion or indictment and that the burden of proof is to be upon persons claiming exemption.

Section 9 subjects any one violating or failing to comply with the requirements of the Act to a fine of not more than $2,000 or imprisonment not more than five years or both.

Section 10 authorizes appointment of agents and others necessary to enforce provisions of the Act and

Section 11 makes appropriation for carrying out the Act.

son, and not be a fruitless, useless inhibition only resulting in what is in effect a duplication of punishment for substantially the same crime, as in the case of *United States* v. *Katz*, 271 U. S. 354, 362.

It would seem to be admissible and wise, in a law seeking to impose taxes for the sale of an elusive subject, to require conformity to a prescribed method of sale and delivery calculated to disclose or make more difficult any escape from the tax. If this may be done, any departure from the steps enjoined may be punished, and added penalties may be fixed for successive omissions, but all for the one ultimate purpose of making it difficult to sell opium or other narcotics without registering or paying the tax.

The reasonableness of such requirements is well illustrated in the many limitations which were imposed upon the ancient freedom in the making and sale of distilled spirits, to the end that the collection of the heavy tax on the subject-matter might be successfully secured in spite of the temptation to avoid the tax. The provision of § 2 making it an offense to sell unless the purchaser gives a particular official form of order to the seller was enacted with a like object. The sale without such an order thus carries its illegality on its face. Its absence dispenses with the necessity of sending to examine the list of those registered to learn whether the seller is engaged in a legal sale. The requirement that the official forms can only be bought and obtained by one entitled to buy, whose name shall be stamped on the order form, and that after the sale the order form shall be recorded, effects a kind of registration of lawful purchasers, in addition to one of lawful sellers, and keeps selling and buying on a plane where evasion of the tax will be difficult.

There are persons who may lawfully have access to or even custody of the drugs without registration. Thus included among such persons are the employees of those

who have registered and paid the tax. If they were to attempt to sell such drugs, the necessity for an order form from the would-be purchaser would embarrass the illegal sale, for the participants would hesitate to make a record of the transaction. Thus the operation of § 2, in preventing an individual not a registered dealer or physician from acquiring the drug other than by an order form or a prescription, is directly related to tax enforcement, because such drugs are not necessarily consumed by the purchaser but may be peddled or sold illegally. These order form provisions constitute a needed check on illegal sales, and they are distinctly helpful in the detection of any attempted dealing in, or selling of, the drug free from the tax.

Section 2 of the Act is the same as it was when originally passed in 1914. The construction put upon it before the amendment of § 1, by the Revenue Act of 1918, must be the same now as before. Under § 1 in the original Act, the only provision to keep track of purchasers was the order form provision of § 2, as it is now. Without it, unless it applied to those not required to register or pay the tax, there was no restriction upon such persons, whether illegal sellers or illegal purchasers, in the disposition and spread of the drug, except the simple punishment for unregistered sellers in the first section, and there was entire immunity from order requirements of the purchasers from illegal sales. We can not suppose that, considering the general language of § 2, any such result was intended by Congress.

By the amendment of § 1, much higher occupation taxes were imposed, and they vary in amount for producers and manufacturers and for wholesale and retail dealers and for physicians. More than that, an excise tax of one cent per ounce of the drug is imposed and payment thereof is to be evidenced by stamps attached to the bottle or box

containing the drug, and the sale of the drug from anything but a stamped bottle or container is punishable. The provision for order forms is thus useful under the amended section, and there is therefore still reason for holding the provisions of § 2 to apply to all persons so as to be helpful in promoting detection of evasion from the added tax imposed under the new § 1. The two tax provisions of that section would be much less effective if a purchaser of drugs from an unregistered dealer is not required to furnish an order form. The purchaser may be himself one who should register, but has not done so, or he may be dealing in and selling the drug on which the stamp tax has not been paid, and it is just as important that sales by an unregistered dealer should be punished, unless made on a prescribed form, as that sales by registered dealers should be subject to penalty.

There is nothing in the language of the section itself that would reduce the significance of the words "any person" from the meaning of "all persons" to that of those persons only who are required to register and pay the tax, as there was in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, upon which the appellant relies much. In that case, the defendant was indicted for conspiring to get morphine into the possession of an unregistered person for use by him as an addict and not for medical purposes. The question was whether the possession conspired for was within § 8 of the Act, declaring it unlawful for any person who was not registered and had not paid the special tax to have the drug in his possession. It was held that § 8 applied only to persons required to register under § 1 and pay the occupation tax. The language of § 8 is more restricted than § 2. It reads: "That it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under

his control any of the aforesaid drugs." The words "any person" in § 2 are not linked with those who have not registered and have not paid the tax, but ought to do so, as are the same words in § 8. The narrow construction of § 8 in the *Jin Fuey Moy* case was reached, in part certainly, because of the juxtaposition of the words. This is shown by a more recent decision of this Court in *United States* v. *Wong Sing*, 260 U. S. 18. In that case, Wong Sing was indicted under the amendment, § 1006 of the Revenue Act of 1918, for purchasing the drug not from an original stamped package and not from a person who was a registered dealer. It was objected that, under the *Jin Fuey Moy* case, a person to be criminally liable under § 1006 must be of a class who must register and pay taxes, but it was held that that section was not limited, as § 8 was held to be.

In *Fyke* v. *United States*, 254 Fed. 225, the Circuit Court of Appeals for the Fifth Circuit decided that the proper construction of § 2, under the original Act of 1914, made it applicable to sales by any person, whether registered or not. Speaking of the Act as it was before 1918, the Court said:

"All sellers were members of the class required to register and pay the tax, under § 1, and the revenue derived from sellers, as provided for by that section, could manifestly not be collected unless Congress had the power to, and did in fact, punish the sale of the prohibited drugs by all persons except when made in conformity to the act. The necessity of prohibiting sales by unregistered persons and of sales by registered persons, not complying with the act, were of equal importance. If only the latter class were subject to its penalties, all persons, by failing to register, could sell with impunity, without paying the tax or complying with the other requirements of the act.

"Section 1 punishes sales by persons who have neither registered nor paid the tax. Section 2 punishes persons

who sell, not in pursuance of a written order of the person to whom the sale is made. The language of § 2 is general, and does not restrict the prohibition to registered sellers in terms. Indeed, the exception, lettered 'd,' applies to a class expressly excepted from registry and payment of the tax by § 1. This exception would seem to be superfluous, if § 2 applied only to registered persons, since the excepted class would not then be included in the class against whom the penalties of the section are directed."

The exception "d" here referred to is that which requires no order form to be used by officers of the national, state, county and municipal governments, in purchases for certain governmental uses, and which would indicate that such officers, who are not required to register, would, but for this exception, be covered by § 2.

The Circuit Court of Appeals of the Ninth Circuit, in *Coleman* v. *United States,* 3 F. (2d) 243, expressly found that the first provision of § 2 was not intended to be limited in its application to the persons required to register under § 1.

United States v. *Katz,* 271 U. S. 354, is said to be in conflict with our view of the question before us. We do not think so. Defendants there were indicted for a conspiracy to sell intoxicating liquors, without making a permanent record of the sale, in violation of § 10, Title II, of the National Prohibition Act. That section provided that no person should make, sell or transport intoxicating liquor without making a permanent record of it, showing in detail the amount and kind of liquor dealt with, the names of persons with whom dealt, and the time and place of such dealing. The form of the records was to be prescribed by the Commissioner and to be open to inspection by him, his agent, or any peace officer of the State. The defendants contended that the section applied only to those who under the Act were authorized to sell liquor under a permit. The United States con-

tended that the section in its general negation applied to any violator of the Act. We held with the defendants that such a construction of § 10 imputed to Congress an improbable incongruity, in wishing to add to the crime of making, selling or transporting liquor a second offense if the person committing it should fail to make a record of his own wrong doing. It was pointed out that Congress had before it the previous revenue acts governing distillers, rectifiers and brewers, requiring detailed records of all transactions which were lawfully subject to governmental regulation as a condition of granting permits, and that when Congress came to the Prohibition Act it adopted the same system of permits; and the parliamentary history of § 10 showed that to secure records from its permittees was its only purpose in that section. The *Katz* case was really, therefore, decided because of the incongruity that would result in an interpretation of § 10 as claimed by the Government. Here there is really no such incongruity.

Section 2 of the Anti-Narcotic Act introduces into the Act the feature of the required and stamped order form to accompany each sale. It is to bear the name of the purchaser, and is addressed to the seller, with other data. Recorded as the law requires it to be, it constitutes a registry of purchasers, as distinguished from that of sellers. Congress intended not only to punish sales without registration under the first section, but also to punish them without order forms from the purchaser to the seller, as a means of making it difficult for the unregistered seller to carry through his unlawful sales to those who could not get order forms. Thus an illegal unregistered seller might wish to clothe his actual unregistered sales with order forms that would give the transaction a specious appearance of legality. To punish him for this misuse of an order form is not to punish him for not

recording his own crime. It is to punish him for an added crime—that of deceiving others into the belief that the sale is a lawful sale. There is no incongruity in increasing the criminal liability of the non-registered seller who fails to use an order form in his sales, or who misuses it. Both the registered and the non-registered seller are, under our construction of the section, punished for not using the order forms as the statute requires, or for misusing them. The order form is not a mere record of a past transaction—it is a certificate of legality of the transaction being carried on, or else it is a means of discovering the illegality and is useful for the latter purpose. We think the resemblance of the *Katz* case and this case is superficial and that they are distinguishable.

We are of opinion, therefore, that the provision which is contained in the first sentence of § 2 of the Act is not limited in its application to those persons who by § 1 are required to register and pay the tax. We answer the first question in the negative.

This brings us to the second question, which is ". . . is the provision as so construed, constitutional?" It was held to be constitutional in *United States* v. *Doremus*, 249 U. S. 86, 94. In that case the validity of the Anti-Narcotic Drug Act, as it was enacted, December 17, 1914, 38 Stat. 785, was under examination by this Court. The inquiry was whether § 2, in making sales of the drugs unlawful except to persons giving orders on forms issued by the Commissioner of Internal Revenue, to be preserved for official inspection, and forbidding any person to obtain the drugs by means of such order forms for any other purpose than use, sale or distribution in the conduct of a lawful business, or in the legitimate practice of his profession, bore a reasonable relation to the enforcement of the tax provided by § 1 and did not exceed the power of Congress. It was held that § 2 aimed to confine sales

to registered dealers, and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians; that Congress, with full power over the subject, inserted these provisions in an Act specifically providing for the raising of revenue. Considered of themselves, the Court thought that they tended to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue; that they tended to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. This Court said in the *Doremus* case:

"This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being as the indictment charges an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax, at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue."

Referring to the same § 2, in *United States* v. *Balint*, 258 U. S. 250, 253; this Court said:

"It is very evident from a reading of it that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the Government and that it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic."

Four members of the Court dissented in the *Doremus* case, because of opinion that the court below had correctly held the Act of Congress, in so far as it embraced the matters complained of, to be beyond its constitutional

power, and that the statute, in § 2, was a mere pretext as a tax measure and was in fact an attempt by Congress to exercise the police power reserved to the States and to regulate and restrict the sale and distribution of dangerous and noxious narcotic drugs. Since that time, this Court has held that Congress by merely calling an Act a taxing act can not make it a legitimate exercise of taxing power under § 8 of Article I of the Federal Constitution, if in fact the words of the act show clearly its real purpose is otherwise. *Child Labor Tax Case,* 259 U. S. 20, 38. By the Revenue Act of 1918, the Anti-Narcotic Act was amended so as to increase the taxes under § 1, making an occupation tax for a producer of narcotic drugs of $24 a year, for a wholesale dealer, $12, for a retail dealer, $6.00, and for a physician administering the narcotic, $3.00. The amendment also imposes an excise tax of one cent an ounce on the sale of the drug. Thus the income from the tax for the Government becomes substantial. Under the Narcotic Act, as now amended, the tax amounts to about one million dollars a year, and since the amendment in 1919 it has benefited the Treasury to the extent of nearly nine million dollars. If there was doubt as to the character of this Act—that it is not, as alleged, a subterfuge—it has been removed by the change whereby what was a nominal tax before was made a substantial one. It is certainly a taxing act now as we held in the *Alston* case.

It may be true that the provisions of the Act forbidding all but registered dealers to obtain the order forms has the incidental effect of making it more difficult for the drug to reach those who have a normal and legitimate use for it, by requirement of purchase through order forms or by physician's prescription. But this effect, due to the machinery of the Act, should not render the order form provisions void as an infringement on state

police power where these provisions are genuinely calculated to sustain the revenue features. Section 2 was once sustained by this Court some nine years ago, with more formidable reason against it than now exists under the amended statute. Its provisions have been enforced for those years. Whatever doubts may have existed respecting the order form provisions of the Act have been removed by the amendment made in 1919.

We said in the *Child Labor Tax Case,* 259 U. S. 20, 38:

"Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive."

In this case, the qualification of the right of a resident of a State to buy and consume opium or other narcotic without restraint by the Federal Government, is subject to the power of Congress to lay a tax by way of excise on its sale. Congress does not exceed its power if the object is laying a tax and the interference with lawful purchasers and users of the drug is reasonably adapted to securing the payment of the tax. Nor does it render such qualification or interference with the original state right an invasion of it because it may incidentally discourage some in the harmful use of the thing taxed. *License Tax Cases,* 5 Wall. 462; *Nicol* v. *Ames,* 173 U. S. 509, 524; *Knowlton* v. *Moore,* 178 U. S. 41, 60, 61; *In re Kollock,* 165 U. S. 526, 536.

This leads to an answer to the second question in the affirmative, and makes it unnecessary for us to answer the remaining third and fourth questions.

The separate opinion of MR. JUSTICE McREYNOLDS.

Nigro, not alleged to be registered as a dealer, was charged with violating § 2 of the Harrison Anti-Narcotic

Act by selling opium (whether in or from an original stamped package does not appear) to Raithel, not a dealer, without an order upon a form issued by the Commissioner of Internal Revenue.

It is maintained, first, that § 2 applies to all sales, including, of course, those made by one who is not registered, to a purchaser who cannot possibly secure an order form; and, secondly, that so construed, it is constitutional. Both propositions, I think, are wrong.

Section 1 of the Act imposes a definite tax (uniform for each class) upon "every person" who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium; also a stamp tax of one cent per ounce upon the drug. All who are subject to the tax are required to register; and the section further provides—

"It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section.

Section 2. declares—

"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs [opium, &c.] except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. . . .

"The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this Act in their districts, respectively; . . ."

Obviously, no one who has not registered and paid the special tax laid by § 1 can obtain "suitable forms."

Fair application of the principles of construction approved in *United States* v. *Palmer,* 3 Wheaton 610; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, and *United States* v. *Katz,* 271 U. S. 354, should at least limit the words "any person" in the first line of § 2 to those required to register by § 1, which renders unlawful every sale by an unregistered person, whether the purchaser possesses an order blank or no. And it seems unreasonable to conclude that the purpose of the next section was awkwardly to state something already plainly declared.

The sale by Nigro was to one who could not obtain an order blank. Only a small group—importers, manufacturers, dealers, etc.—can obtain these blanks. As construed by the United States, the statute prohibits all sales except to those who are registered or hold physicians' prescriptions—no others can buy lawfully. Admittedly, the statute is valid only as a revenue measure. Any provision therein not appropriate to that end is beyond the power of Congress.

I can discover no adequate ground for thinking Congress could have supposed that collection of the prescribed tax would be materially aided by requiring those who engage in selling surreptitiously to consumers to do an impossible thing—receive an order upon a blank which the purchaser could not obtain. The plain intent is to control the traffic within the States by preventing sales except to registered persons and holders of prescriptions, and this amounts to an attempted regulation of something reserved to the States. The questioned inhibition of sales has no just relation to the collection of the tax laid on dealers. The suggestion to the contrary is fanciful. Although disguised, the real and primary purpose is not difficult to discover and it is strict limitation and regulation of the traffic.

Whether, or how far, opium, tobacco, diamonds, silk, etc., may be sold within their borders is primarily for the States to decide; the Federal Government may not undertake direct regulation of such matters.

This Court said in *United States* v. *Wong Sing*, 260 U. S. 18, 21: "There could be no object in requiring a purchaser of the drugs to register, but it fulfilled the purpose of the law to forbid a purchase 'except in the original stamped package or from the original stamped package.'"

The habit of smoking tobacco is often deleterious. Many think it ought to be suppressed. The craving for diamonds leads to extravagance and frequently to crime. Silks are luxuries and their use abridges the demand for cotton and wool. Those who sell tobacco, or diamonds, or silks may be taxed by the United States. But, surely, a provision in an act laying such a tax which limited sales of cigars, cigarettes, jewels, or silks to some small class alone authorized to secure official blanks would not be proper or necessary in order to enforce collection. The acceptance of such a doctrine would bring many purely local matters within the potential control of the Federal Government. The admitted evils incident to the use of opium cannot justify disregard of the powers "reserved to the States respectively, or to the people."

MR. JUSTICE SUTHERLAND concurs in these views.

MR. JUSTICE BUTLER, dissenting.

Section 1 was originally enacted December 17, 1914, c. 1, 38 Stat. 785. It was amended by the Revenue Act of 1918 passed February 24, 1919, § 1006, c. 18, 40 Stat. 1057, 1130. It contains the following: "It shall be unlawful for any person required to register under the provisions of this Act to . . . sell . . . any of the aforesaid drugs without having registered and paid the special tax as imposed by this section."

Section 2 appeared in its present form in the original Act. The pertinent provision is: "It shall be unlawful for any person to sell . . . any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold . . . on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue." 38 Stat. 786.

The effect of these two provisions is to prohibit sale by any person who has not registered and to permit sale by a registered person upon a written blank issued by the Commissioner. That conclusion is so plain that discussion cannot affect it.

Question 1 should be answered Yes.
Question 2 need not be answered.
Question 3 should be answered Yes.
Question 4 should be answered No.

MR. JUSTICE SUTHERLAND concurs in this opinion.

CORONA CORD TIRE COMPANY *v.* DOVAN CHEMICAL CORPORATION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 182. Argued January 16, 17, 1928.—Decided April 9, 1928.

1. Discovery that a change of ingredients in a process speeds the result, entitles the inventor to any other advantages flowing from the substitution. P. 369.
2. The fact that a party was the first to discover and obtain a valid patent for a process of producing a substance, *held* irrelevant to the question whether he was the first discoverer of its utility as an ingredient in another process. P. 370.
3. Under Rev. Stats. § 4886, a person is not to be denied a patent because of a publication printed after his discovery and not more than two years before his application. P. 372.
4. Invention of a process for vulcanizing rubber, and its reduction to practice, may be established by proof of actual tests in which test

slabs of rubber, properly vulcanized, were made. Production of rubber goods for use or sale was not indispensable. Pp. 373, 383.

5. Reckless overstatements of the extent of earlier reduction to practice by the applicant, made in affidavits filed in a patent proceeding to meet a reference of prior publication, *held* not destructive of the presumption of validity accompanying the patent, where the sufficiency of the affidavits in other respects rendered such statements superfluous. P. 374.
6. Where a patentee met a reference in the patent proceeding merely by evidence of his own priority of discovery, his failure then to attack its sufficiency in other respects did not subject him to the burden of proving it insufficient in a suit to enjoin infringement of the patent. P. 374.
7. The findings of a trial court which heard the witnesses are not conclusive here when contrary to the findings of the Circuit Court of Appeals made in the same case, and of the trial court in another case, upon the same evidence. P. 375.
8. Priority of discovery may be proved by one witness, not financially interested, in connection with other circumstances. P. 382.
9. One who first discovered and proved the utility of an improvement in a process, can not be said to have abandoned his invention, as against a subsequent discoverer or patentee, because he did not use the discovery commercially or apply for a patent. P. 384.
10. A claim to the exclusive use of a large group of related chemical compounds, unsupported by proof that all have a common quality rendering each useful in the process patented, is too broad. P. 385.
11. Patent No. 1,411,231, issued March 28, 1922, to Weiss for a process of vulcanizing rubber by combining with the rubber compound, diphenylguanidine, or "a disubstituted guanidine," and for the vulcanized product, *held* invalid. P. 385.

16 F. (2d) 419, reversed.

CERTIORARI, 273 U. S. 692, to a decree of the Circuit Court of Appeals which reversed a decree of the District Court, 10 F. (2d) 298, dismissing a bill to enjoin infringement of a patent. See also *Dovan Chemical Corp'n* v. *Nat'l Aniline Co.*, 292 Fed. 555.

Mr. Dean S. Edmonds, with whom *Messrs. Wm. H. Davis* and *Frank E. Barrows* were on the brief, for petitioner.

There was no criticism whatever of the sufficiency of the Kratz paper as a disclosure of all that was contained in the Weiss application. Instead, affidavits were submitted attempting to establish an earlier date for Weiss. This constitutes an admission that the disclosure in the Kratz paper covered all that was claimed by the applicant and that the rejection was a proper one. *Ex Parte Saunders,* 1883 C. D. 23, 24; *The National Case,* 292 Fed. 558.

The grant of the patent in suit was secured by misrepresentation of the facts in ex parte affidavits.

This situation calls for the application of the rule, that in the absence of manifest error an appellate court will not go behind a ruling of the trial court on such an issue as credibility of witnesses. It is no argument against the application of this rule that the Court of Appeals reversed the ruling of the District Court.

If a patentee is not the first inventor, his patent is void. This Court has reiterated that proposition at brief intervals over the past hundred years, the most recent instance being in *Alexander Milburn Co.* v. *Davis-Bournonville Co.,* 270 U. S. 390.

The prior knowledge and use by a single person is sufficient. The number is immaterial. *Coffin* v. *Ogden,* 18 Wall. 120; *Egbert* v. *Lippmann,* 104 U. S. 333; *Hall* v. *Macneale,* 107 U. S. 90; *Alexander Milburn Co.* v. *Davis-Bournonville Co., supra.* See also *Kendall* v. *Windsor,* 21 How. 322; *Pennock* v. *Dialogue,* 2 Pet. 1; *McClurg* v. *Kingsland,* 1 How. 202.

The reading of the Kratz paper was a step toward publication just as is the filing of an application for patent, and the subsequent printing and distribution of the paper was a publication just as is the issuance of a patent. Both are publications; they differ only in that one is publication with an altruistic motive, whereas the other is publication for a consideration, namely, the monopoly

covered by the patent. The diligence of one man or the other does not have to be considered because no question of diligence is presented when one man was first both in the conception of the invention and also in giving it to the public. *National* case, 292 Fed. 559; *Twentieth Century Mach. Co.* v. *Loew Mfg. Co.*, 243 Fed. 373. See also *Lowe* v. *Pacific Gas & Elec. Co.*, 2 F. (2d) 157; *Automatic Weighing Machine Co.* v. *Pneumatic Co.*, 166 Fed. 288; *Christie* v. *Seybold*, 55 Fed. 69.

If there was any abandonment at any stage of the way, it was abandonment of a completed invention, completed in 1916 at Norwalk, and any such abandonment was abandonment to the public, which made the invention open for use by anyone. *Evans* v. *Eaton*, 3 Wheat. 454; *Consolidated Fruit Jar Co.* v. *Wright*, 94 U. S. 92; *Planing Machine Co.* v. *Keith*, 101 U. S. 479; *Pickering* v. *McCullough*, Fed. Cas. No. 11,121, 3 Ban. & A. 279, affirmed 104 U. S. 310; *Shoup* v. *Henrici*, Fed. Cas. No. 12,814, 2 Ban. & A. 249; *Harbridge* v. *Perrin*, 295 Fed. 927.

When the matter under consideration is the effect of a prior publication in a patent suit, testimony of the author of the publication as to what he intended to disclose or what he intended to withhold is not only unimportant, but is irrelevant. *Badische Anilin etc.* v. *Kalle & Co.*, 104 Fed. 802.

The Weiss patent is invalid because of the prior use of DPG by Dr. Kratz and the Falls Rubber Company. There is no rule of law that requires rejection of the uncorroborated testimony of an inventor as to the date of his conception. *Armstrong* v. *DeForest*, 280 Fed. 584; *Sipp Electric & Machine Co.* v. *Atwood-Morrison Co.*, 142 Fed. 149; *Tompkins* v. *N. Y. Woven Wire Mattress Co.*, 159 Fed. 133; *Riley* v. *Daniels*, Fed. Cas. No. 11,837.

Weiss is not an original inventor. The Weiss patent does not disclose a patentable invention.

To a chemist familiar in 1918 with the guanidines in general and triphenylguanidine in particular, the most natural thing in the world would have been to think of diphenylguanidine as usable for the same purpose, and every rubber chemist would have known that the only way to find out would be to try it according to the routine methods of laboratory testing. These accelerators and these test methods are but the tools of the organic chemist and of the rubber chemist. He picks out the proper one from among those known to him, just as the designer of machines chooses that mechanical element which will serve his purpose, and when he has no rule which will lead him to an immediate selection of the proper chemical, he, like the designer of machines, resorts to a process of trial, using the expected skill of his calling. Crediting Weiss with all that is claimed in his behalf, he cannot fairly be said to have made an invention by being led by the use of triphenylguanidine to think that diphenylguanidine might be an accelerator too, trying it and finding out that it is. *Smith* v. *Nichols,* 21 Wall. 112; *Atlantic Works* v. *Brady,* 107 U. S. 192.

But even if that had not been a known principle, no inventive act would have been involved in ascertaining that by using the DPG whose greater activity was discovered by Kratz, a better rubber would be produced. *Stow* v. *Chicago,* 104 U. S. 547; *Lovell Mfg. Co.* v. *Cary,* 147 U. S. 623; *Roberts* v. *Ryer,* 91 U. S. 150.

Claims 1, 5 and 9 of the Weiss patent are invalid by reason of special matters applying to them only.

Mr. John W. Davis, with whom *Mr. James J. Kennedy* was on the brief, for respondent.

Weiss is entitled to date his invention as early as March, 1918, for its conception, and February-March, 1919, for its reduction to practice, under either of which dates he is first, sole, true and original inventor. *Christie*

v. *Seybold,* 55 Fed. 69; *Merrow* v. *Shoemaker,* 59 Fed. 120; *Automatic Weighing Machine Co.* v. *Pneumatic Scale Corp.,* 166 Fed. 288; *Loom Co.* v. *Higgins,* 105 U. S. 580.

The only inference that can be drawn from Kratz' behavior and from that of the Norwalk Company is that nothing was discovered as to the practical utility of DPG in the rubber art. "The intent of the statute was to guard against defeating patents by the setting up of a prior invention which had never been reduced to practice." *Bedford* v. *Hunt,* 1 Mason 302. See also *Agawam Co.* v. *Jordan,* 7 Wall. 583; *Tilghman* v. *Proctor,* 102 U. S. 707; *Diamond Meter Co.* v. *Westinghouse Electric Mfg. Co.,* 152 Fed. 704; *Eibel Co.* v. *Paper Co.,* 261 U. S. 45; *Deering* v. *Winona Harvester Works,* 155 U. S. 286.

Oral testimony, unsupported by patents or exhibits, tending to show prior use of a device regularly patented is, in the nature of the case, open to grave suspicion. *Deering* v. *Winona Harvester Works,* 155 U. S. 286; *Pyrene Mfg. Co.* v. *Boyce,* 292 Fed. 480.

Secret uses are infected with incredibility. Still more so if isolated. *Richards* v. *Burkholder,* 29 App. D. C. 485; *Washburn & Moen Mfg. Co.* v. *Beat 'Em All Barbed Wire Co.,* 143 U. S. 275.

The Kratz paper did not disclose the intention of the patent in suit. The paper was irrelevant as subsequent to the date of Weiss' invention.

The court below was correct in holding that it was unnecessary to consider the technical contents of the Kratz paper in view of the consensus of the expert testimony in this case that it disclosed nothing as to the practical utility of DPG as a vulcanization accelerator. A consideration of the technical contents of the Kratz paper shows that it contains no such disclosures as can invalidate the patent in suit.

He is the first inventor, and entitled to the patent, who being an original discoverer, has first perfected and adapted the invention to actual use. *Whitely* v. *Swayne,* 7 Wall. 685; *Coffin* v. *Ogden,* 18 Wall. 120.

Petitioner also relies on the fact that when upon Weiss' application for the patent in suit, the Patent Examiner referred to the Kratz paper as an anticipation, Weiss availed himself of his privileges under Rule 75 of the Patent Office, permitting an applicant to establish by affidavit a date for his invention earlier than that of a cited anticipation. The contention is that this was an admission that the Kratz paper constituted an anticipation. The Court should not overlook that the Patent Office practically invited Weiss to take advantage of Rule 75 rather than contest the finding of anticipation. Had Weiss elected to contest the sufficiency of the Kratz paper, a prolonged controversy with the Patent Office might have developed with destructive consequences to the then infant business. The practice under Rule 75 is well established in the Patent Office and has received the sanction of the courts. *Thacher* v. *Mayor,* 219 Fed. 909; and *Deering* v. *Winona Harvester Works,* 155 U. S. 286, not only approve the practice under Rule 75, but hold that in a subsequent suit on a patent issued pursuant to an affidavit presented under the rule, the party attacking the patent must disprove the truth of the facts shown by the affidavit.

The Weiss patent disclosed a patentable invention.

Mr. Chief Justice Taft delivered the opinion of the Court.

This is a bill by the Dovan Chemical Corporation against the Corona Cord Tire Company, to enjoin infringement of a patent issued to Morris L. Weiss, assignor of the Dovan Chemical Corporation. The District Court

for the Western District of Pennsylvania dismissed the bill for lack of validity of the patent. 10 Fed. (2d) 598. The dismissal was reversed and the patent and the infringement charged were both sustained by the Circuit Court of Appeals for the Third Circuit. 16 Fed. (2d) 419. A writ of certiorari was granted, 273 U. S. 692, because in the prior case of *Dovan Chemical Corporation* v. *National Aniline & Chemical Company,* 292 Fed. 555, the Second Circuit Court of Appeals had reversed the decree of the District Court for the Southern District of New York (not reported) in favor of the Dovan Corporation and had held that the patent was invalid on the ground that Weiss was not the first discoverer.

The patent in suit relates to the vulcanization of rubber. Vulcanizing consists in mixing a small amount of sulphur with rubber and subjecting the mixture to heat for a period of time, during which a chemical combination of the rubber and sulphur takes place and commercial rubber is made. The patentee recites that the object of his invention is to "improve rubber compounds so that the finished product shall be of superior quality and so that the time required for vulcanization shall be greatly reduced over that ordinarily required for such a purpose. It is known that when certain organic substances are added to the rubber mix during the compounding, a catalytic or similar action is produced which causes the rubber or similar gum to unite or react more rapidly and thoroughly with sulphur or other vulcanizing agents." The patentee continues:

"I have discovered that disubstituted guanidines, particularly diphenylguanidine, is particularly effective for this purpose." (This substance is indicated by the formula given in the patent.)

He says further:

"I am aware that triphenylguanidine has been suggested, and probably used to some extent, as an accelera-

tor in the vulcanization of rubber, but the use of diphenylguanidine for that purpose appears to have been unknown prior to my researches on this substance.

"I have found that diphenylguanidine is much more powerful and efficacious as an accelerator in vulcanization than triphenylguanidine. For example, in the vulcanization of hard rubber articles the use of diphenylguanidine not only hastens the vulcanizating action but results in a final product much superior in texture, strength, durability and aging qualities over that when the triphenylguanidine is used."

The patentee makes a short reference to a formula by which he produces the rubber mix, in which he says:

"The rubber may be compounded in the following proportions: 50 parts by weight of new rubber, 45.5 parts by weight of zinc oxide, 3.5 parts by weight of sulphur, 1 part by weight of diphenylguanidine. These are mixed together in any suitable way, such as by milling, and then vulcanized or cured in the usual molds or otherwise under heat corresponding to a steam pressure of about 40 lbs. per square inch. This vulcanizing temperature should be continued until the compound is suitably vulcanized, which requires from 10 to 20 minutes depending upon the shape and size of the articles being vulcanized."

The patent contains twelve claims. Those mainly relied on are: the fourth, for "The process of treating rubber or similar materials which comprises combining with the rubber compound diphenylguanidine"; the eighth, for "The process of treating rubber or similar materials, which comprises combining with the rubber compound a vulcanizing agent and diphenylguanidine"; and the twelfth, for "A vulcanized compound of rubber or similar material combined with a vulcanizing agent and diphenylguanidine."

Vulcanizing is old and well known. Its present high state of development represents an evolution of about 80

years. Practically all rubber must be vulcanized for commercial use. The amount of sulphur in the mixture is comparatively small, as for instance 4 to 10 parts of sulphur to 100 parts of rubber. The remainder of the mixture may be all rubber or it may be partly rubber and partly other ingredients, such as fillers and pigments, the other ingredient used most widely being zinc oxide. In the manufacture of automobile tires a considerable proportion of zinc-oxide is generally used. A very old and well known proportion has been fifty parts of rubber, forty-five parts of zinc oxide and five parts of sulphur and is the one shown in the specification of the patent. The mixture is "cured" by subjecting it to heat to make the vulcanized rubber of commerce. Platen molds have to be provided for giving the desired form to the rubber vulcanized. Steam has to be supplied for heating the molds and the rubber mix, during the "cure." A "cure" is the successful completion of the chemical union or vulcanization of the rubber with the sulphur. The fact of a successful "cure" for practical purposes is established by a simple and short method called the thumb and tooth test. By this test, rubber chemists settle the fact and determine by the resulting product the satisfactory quality of the stock or the mix for vulcanization and they become expert at it. If by this test the product is not well united chemically, it is said to be "under cured" or "over cured," and then the operator changes the ingredients or the time of the process. When it is important to determine with greater exactness the tensile strength and degree of elasticity or other qualities of the product, a special machine measure or test is used, but the thumb and tooth test is the frequently used way of knowing a cure and it is a satisfactory one for every day use in business.

It has been long known that a "cure" can be hastened by mixing with the ingredients a small quantity of what

is called an accelerator or vitalizer. Inorganic substances like lime or litharge were originally employed as such, but it was subsequently found that certain organic substances were more powerful or more "active," as the term is, and they came into more general use. The heat to which the rubber mixed with sulphur is subjected has a deleterious effect upon the substance of the raw rubber, and the longer the heating, the greater the injury. An accelerator, as it lessens the time of the cure, not only increases the output of the equipment used but reduces the danger of deterioration of the product. An accelerator thus improves the elasticity, tensile strength, and other desirable commercial qualities of the finished product. It is not fully understood what the vitalizing or catalytic action of the accelerator is, but its existence and its results have long been known.

The patentee in his specifications speaks of triphenylguanidine and compares its operation as an accelerator with that guanidine, the utility of which as an accelerator he claims to have discovered, called diphenylguanidine. Guanidines are a group of organic substances which have become prominent and important in this quest for useful accelerators. The monophenylguanidine and the diphenylguanidine and the triphenylguanidine are closely related chemically. Their long names, used to indicate the variation in the component elements, have been shortened so that it is usual to refer to diphenylguanidine by letters, as "D. P. G.," and the triphenylguanidine as "T. P. G."

So closely do the chemical compositions of these two resemble each other that the petitioner contends that the patent is invalid because the utility of D. P. G. as an accelerator was plainly indicated by general chemical knowledge and did not involve patentable discovery after T. P. G. had proven to be a good one for this purpose. But we can not agree with this view. The catalytic ac-

tion of an accelerator can not be forecast by its chemical composition, for such action is not understood and is not known except by actual test.

The respondent attempts to show that the resulting improvement in the rubber product by the use of diphenylguanidine was something different from that in the use of other accelerators. The good results of the use of diphenylguanidine are chiefly or wholly due to its greater activity and the lessened time of the cure. The expert evidence seems to show that T. P. G. as an accelerator develops the same desirable qualities, set forth on behalf of respondent, in the vulcanized rubber as does D. P. G., except that the cure of the latter is more rapid with its to be expected advantages. Moreover, claims of peculiar usefulness of D. P. G. in other than its "activity" and speed as an accelerator, even if proven, could not in any degree affect the issue in this case. If employment of D. P. G. as a useful accelerator was a discovery by Weiss, prior to anyone else, Weiss, or his assignee, is entitled to all the advantages that flow from that increased activity or from any other quality in its use as such. *Roberts* v. *Ryer,* 91 U. S. 150, 157; *Stow* v. *Chicago,* 104 U. S. 547, 550; *Lovell Mfg. Co.* v. *Cary,* 147 U. S. 623, 634.

It does not, on the other hand, give Weiss any more right to appropriate D. P. G. as an accelerator because he may have elaborated in his specifications other advantages from its use than if he had not mentioned them. Nor, on the other hand, does it minimize or affect the priority of completed discovery by some one else before Weiss that the prior discoverer may not have perceived and stated all the advantages of an earlier use of D. P. G. as an accelerator.

Judge Hough, of the Second Circuit, truly said, therefore, that this patent meant, condensed in one sentence: "I claim the use of D. P. G. as an accelerator, because I

was the first person who observed its efficacy for that purpose." Similarly, the examiner in the Patent Office who allowed the patent said that Weiss' application was "no more than a broad disclosure of the use of [D. P. G.] without disclosing any details other than those usually employed with accelerators of this class."

The patent in suit was applied for November 12, 1921, and was granted March 28, 1922. Weiss had referred in the specifications of this patent to another patent of his which was applied for July 2, 1921, and granted July 11, 1922. This latter patent was for a process for making D. P. G. in large or commercial quantities. In the application for that patent, the patentee pointed out that before his process was discovered D. P. G. could not be made except in small quantities for chemical research because the cost was prohibitive. The validity of the Weiss patent for a process in making diphenylguanidine is not attacked. The new patented process by reason of the lessened cost has resulted in the very great use of D. P. G. for commercial purposes and has been very profitable. But the purpose of securing the patent in suit and maintaining its validity is more ambitious. It is not to protect and preserve the new process already being safely enjoyed, but it is to prevent the use of D. P. G. as an accelerator, however made by any process that may be subsequently discovered. It is to enlarge a monopoly of D. P. G. as an accelerator, and is thus in effect to discourage effort to find other and cheaper means of making it. What we have to decide here is not the priority of discovery of the cheap process of making the accelerator D. P. G., which it is conceded Weiss invented, but whether he was the first person to discover the efficacy of D. P. G. as an accelerator, made by any process, cheap or costly.

We feel it necessary to call attention to a lack of relevancy of Weiss' successful process patent in the case before us, because the majority opinion in the Circuit Court of Appeals seems to us erroneously to have confused the credit due to Weiss for the process patent, already conceded, with his right to his present claim of entire monopoly of the use of D. P. G. as an accelerator.

The issues and the evidence in this case can not be considered and discussed without reference to a paper read by Dr. George Kratz, a rubber chemist, at the Philadelphia meeting of the American Chemical Society, between the 2nd and the 6th of September, 1919. It was entitled "The Action of Certain Organic Accelerators in the Vulcanization of Rubber," and was a review of the comparative excellence of a number of well-known and used accelerators, as well as that of D. P. G. with T. P. G., in which he found D. P. G. to be very much more active than T. P. G. Then under an experimental part he described the kinds of rubber used, the proportions of rubber and sulphur in the mixture, and the manner in which the accelerator was incorporated and the method of vulcanization. He said:

"The rubber used was good quality, first latex, pale crepe, and the same lot was employed in all mixtures. All mixtures were made under standard conditions; the average time of each batch on the mill was 17.5 min. The same proportion of rubber and sulphur—92.5 parts rubber, and 7.5 parts sulphur—was employed in each instance, but the amount of accelerator was varied, according to the conditions of the experiment.

"All the accelerators soluble in alcohol were dissolved in the smallest quantity of this liquid and introduced into the rubber in solution. Those not soluble—and this applied to the anhydroformaldehyde bodies only—were

ground to 100 mesh and added to the rubber with the sulphur. After mixing, the mixtures were allowed a recovery period of 24 hrs. before they were vulcanized. Vulcanization was carried on in a platen press of the usual type."

"Table 1.—Relative Activities—Thiourea Series.

"*Parts required to Equal one Part Aniline.*

"Aniline	1.000
Urea	0.250
Thiourea	0.300
Monophenylthiourea	0.450
Diphenylthiourea	0.850
Monophenylguanidine (a)	0.075
Diphenylguanidine (Sym.)	0.075
Triphenylguanidine	0.500 "

The activities of the various substances were compared in the mixture previously mentioned—92.5 parts of rubber and 7.5 parts of sulphur—taking as a standard the effect obtained with one part of aniline, vulcanized for 90 min. at 148° C. The amounts of various substances in the urea series required to effect the same degree of vulcanization as obtained with one part of aniline are shown in Table 1.

The paper thus shows that the activity and superiority of D. P. G. as an accelerator over T. P. G. is approximately as 7 is to 1.

In the answer to the bill in this case, the Kratz paper was set up as a defense, but although read before September 6th, 1919, it was not published until April, 1920.

Under § 4886, Revised Statutes, a person who claims to have invented any patentable improvement, is not to be denied a patent because of any printed publication subsequent to his discovery, unless there was publication or public use or sale more than two years prior to his application. Kratz's article was not printed until less

than two years before Weiss' application for a patent in November, 1921, and therefore the paper could not be used as a basis for defense against his patent, if his discovery was earlier than the publication. It nevertheless plays a very important part in understanding the facts in this case.

The main and only issue here is divided, by reason of the evidence and the lines of argument pursued, into two parts. The first is the effect of that part of it devoted to Weiss' discovery and his reduction to practice. The second is that part devoted to Kratz's discovery and his reduction to practice.

First. It is contended by the petitioner that the file wrapper and evidence show, that the patent was secured by false evidence and is not entitled to the presumption of validity which ordinarly accompanies the grant. The examiner in the Patent Office three times rejected the Weiss application, the third time by a reference to the Kratz paper. The hearing on that reference was ex-parte. The third rejection was followed by acquiescence by the examiner because of two affidavits, one by Weiss and one by his fellow chemist Daniels, who claimed to have been with him at the time in the laboratory of the Republic Rubber Company of Youngstown. In these final affidavits, Weiss had said that D. P. G. was produced and actually used "in the vulcanization of rubber goods" during the early part of the year 1919, and Daniels said, "These tests were also carried out in the compounding laboratory for the various departments of the Republic Rubber Company at Youngstown, Ohio, and the accelerator proved to be highly efficient in the actual vulcanization of rubber goods, such as hose, tires, belts, valves and other mechanical goods." It now appears, without contradiction, that the only rubber Weiss made during the early part of the year 1919 from D. P. G. was test slabs of rubber in which D. P. G. was the accelerator, and

that in fact neither he nor anybody in the Rubber Company had vulcanized rubber goods, as Daniels described them, before the Kratz publication. But we do not think this would invalidate the patent, for the reason that the actual fact was that these test slabs of rubber with D. P. G. if proven to be properly vulcanized, as the evidence seems to show, were a demonstration of the utility of D. P. G. as an accelerator and were a completed and demonstrated discovery constituting reduction to practice. Production of rubber-goods for use or sale was not indispensable to the granting of the patent. Hence the affidavits, though perhaps reckless, were not the basis for it or essentially material to its issue. The reasonable presumption of validity furnished by the grant of the patent therefore would not seem to be destroyed.

Then it is claimed that the reference to the Kratz paper, which was not attacked by the applicant for its insufficiency as a reference under § 4886 of the Revised Statutes, should be treated as equivalent to a prior patent, the priority of which could only be overcome by evidence eliminating all reasonable doubt. *The Barbed Wire Patent*, 143 U. S. 275; *Deering* v. *Winona Harvester Works*, 155 U. S. 286, 300; *Clark Thread Company* v. *Willimantic Linen Company*, 140 U. S. 481, 489. But the Kratz paper was not a prior patent, and while it may be that other circumstances such as a reference to a publication made before the application for the patent may have the effect to require the same convincing proof of earlier discovery to avoid its effect (*Westinghouse, etc. Co.* v. *Catskill, etc. Co.*, 121 Fed. 831, 834; *New England Motor Co.* v. *Sturtevant Co.*, 150 Fed. 131, 137; *Wendell* v. *American Laundry Machinery Co.*, 248 Fed. 698, 700), we do not think that the mere failure to invite the attention of the examiner to the defect of the reference under § 4886, Revised Statutes, calls for the strict rule of proof

to avoid the reference. This conclusion keeps the burden of proof on the defendant in attacking the patent on the ground of a prior use.

It is also claimed that because the trial court in this cause found, after hearing the witnesses, the weight to be with the petitioner and against Weiss, assignor of respondent, its conclusions of fact, except for manifest error, are to be treated as unassailable. *Adamson* v. *Gilliland,* 242 U. S. 350, 353; *Davis* v. *Schwartz,* 155 U. S. 631; *Kimberly* v. *Arms,* 129 U. S. 512; *Tilghman* v. *Proctor,* 125 U. S. 136, 149; and *Mason* v. *United States,* 260 U. S. 545, 556. We do not think that this rule applies in the case before us, at least to its full extent, first, for the reason that the Circuit Court of Appeals, having considered all the evidence upon which the trial judge reached his conclusion, declined to approve of his findings, and second, because in the *National Aniline & Chemical Co.* case, which is in conflict with the case here, the trial judge reached a different conclusion on the same issue and the same evidence which we have here. *Thomson Spot Welder Co.* v. *Ford Motor Co.,* 265 U. S. 445, 447. We think, therefore, that the respondent is entitled under these conditions to retain a presumption of validity for his patent in the consideration of the case before us. This brings us then to the evidence which Weiss adduces in support of his first discovery of D. P. G. as an accelerator.

Morris L. Weiss received a degree in chemistry from the Cooper Union of New York City late in 1917, and attended a course of chemical study in the Polytechnic of Brooklyn. He entered the employ of the Republic Rubber Company of Youngstown, Ohio, in October, 1917. That company manufactured rubber articles largely from shoddy or reclaimed rubber. It was seeking to find an improved accelerator in T. P. G. and was building a plant

for its commercial use. Weiss, in addition to his usual work in T. P. G., became interested, in 1918 and 1919, in the possibilities of the use of D. P. G. as an accelerator, which he had inquired into because it was mentioned with T. P. G. among the guanidines in a text book of chemistry which he had read. He was required by the rules of the company to enter his experiments in a book called the "X Book," kept for the purpose. During the term of his employment, prior to September 6, 1919 (the date of Kratz's reading his paper), this X Book showed three dated and recorded experiments with D. P. G. as an accelerator. Two of these were with a shoddy mixture, and there is doubt whether they showed the marked superiority of D. P. G. over T. P. G., as Weiss in another case seems to have admitted. But there was another test, with pure rubber, recorded in the X Book, of successful vulcanization by D. P. G., the date of which is in dispute. It was as follows:

Number X 2034
Made for Accelerator tests—

	E
	50
D. P. G.	1
Sulphur	4
Zinc	43
M. G. O.	2
	100
Cure	20/30
Stretch	14½
Strength	3000
Set	½
Date	2. 10. 19

As it appears now, the date is February 10, 1919. Weiss does not deny that the first figure of the date has been changed, but says that it was probably changed because it

was made originally by mistake as a "1," as on January 10, 1919, when it ought to have been as a "2," as in February, and the change was only to make it one month later. It is contended on the other side, and it was testified by an expert on handwriting, and the District Judge so held, that the change was made from 9-10-19 to 2-10-19, which would carry the original and correct date of this test to the later date of September 10, 1919, or three or four days later than the reading of the paper by Dr. Kratz to the American Chemical Society, and after Weiss had been informed by his colleague Daniels of Kratz's blackboard statement of the results of his discoveries. Weiss says he made other tests between the first successful one and the reading of the Kratz paper, but they are not recorded under specific dates, nor are they in regular order. There is a record of many tests after the Kratz paper, but none others are shown to be before it except by Weiss' and Daniels' unassisted memory.

Then, it is said he did not claim discovery until his application for this patent in November, 1921, while in an application for employment as a chemist at another rubber company in March, 1920, he did claim credit for the new process in commercially making D. P. G., but he attributed its importance to the revelation of the Kratz paper. His explanation is that he then supposed that accelerators were not patentable and he was absorbed in cheapening the production of D. P. G.

Other circumstances are detailed at length in the brief of counsel to show that Weiss' real knowledge of the use of D. P. G. as an accelerator was prompted by Kratz's paper and could not be independent discovery on his part before his hearing of and reading it. But after full consideration of all the doubt-giving circumstances, we do not think that the attack on Weiss's proof of February 10, 1919, as the date when he first discovered by a completed

experiment the successful use of D. P. G. as an accelerator in making rubber, has overcome the evidence given to support it and the presumption of its correctness from the patent itself.

Second. Kratz's discovery.—Dr. Kratz had been engaged in the chemistry of rubber and in its manufacture for more than seven years. He read his paper on D. P. G. and other accelerators in September, 1919. He had been employed as a chemist with the Diamond and Goodrich Companies, and, subsequently, with the Norwalk Tire and Rubber Co. of Connecticut, for several years, and after April, 1917, with the Falls Rubber Company, of Cuyahoga Falls, near Akron, Ohio. He had directed his efforts to the subject of vulcanization almost exclusively and was intimately familiar with the commercial practice therein. His first work with accelerators was as research chemist in 1913. On April 1, 1914, he went with the Norwalk Company in the capacity of chemist, and in April, 1917, he became chief chemist of the Falls Rubber Company.

In 1916, while with the Norwalk Company, Kratz prepared D. P. G. and demonstrated its utility as a rubber accelerator by making test slabs of vulcanized or cured rubber with its use. Every time that he produced such a slab he recorded his test in cards which he left with the Norwalk Company, and kept a duplicate of his own. By these tests he arrived at figures representing the degree of superiority of D. P. G. over T. P. G. and other known accelerators, so that he could determine exactly how much D. P. G. it would be necessary to use to produce the same accelerating effect as would be produced by a larger amount of T. P. G., or of other accelerators, in the same time. This work was known to, and was participated in by, his associate in the Norwalk Company, his immediate superior and the chief chemist of the Company, Dr. Rus-

sell, who fully confirms Kratz's records and statement. This work was finally recorded in a carefully prepared contemporaneous report which Kratz left in the files of the Norwalk Company, and which is now produced by Dr. Russell in evidence before us. When Kratz left the Norwalk Company to go to the Falls Rubber Company, he took with him his record for his use in his future work, so that there are two records of the same thing. The report in 1916 was as follows:

"XI/1/16 G. D. K.

Relative Catalytic Effect of Compounds Related to Sulpho Carbaninide.

"The following formula was used to try out the activity of various substances more or less closely related to sulpho-carbaninide:

White Para	100
Zinc oxide	100
Sulphur	5

"The following effects were recorded and, in cases where an acceleration was produced, the amounts required to give a cure in one hour equal to the cure produced by 3% of S-Carb, were as follows [in the first column]:

		[As shown in Chemical Society Paper, Sept., 1919
"Aniline	3.50%"	3.5
Di phenyl thio urea	3.0%	2.975
Mono phenyl thio urea	1.5%	1.575
Thio urea	1.0%	1.050
Tri phenyl guanidine	1.75%	1.750
Di phenyl guanidine	0.25%	0.262
Urea	0.33%"	0.875]

These results were confirmed by Kratz at the Falls Rubber Company in 1918, and 1919, and were reported

in his paper at the Chemical meeting in September of 1919 as shown in the second column above, multiplied by 3.5 in order to put them on the same basis.

These values were determined by Kratz in some eight or nine tests, in 1916, with each of the substances named, for which test slabs were made in each instance, and the series was extended until the desired result was obtained. The first substance is aniline and the second is thio (diphenylthiourea). These substances were generally known and widely used as accelerators and therefore were used as standards of comparison. They show that Kratz's tests taught him in 1916 that D. P. G. was seven times as strong and as active as T. P. G. The report to the Norwalk Company also shows two different formulas by which Kratz made his own D. P. G. in 1916.

In the fall of 1917, when Kratz was chief chemist of the Falls Company, he received a special order for 1,000 inner tubes for automobile tires. In filling three hundred tubes of this order of 1,000 tubes, which were made under Kratz's personal supervision—for he had then become chief chemist of the Falls Company—he used D. P. G. as an accelerator.

A little later, in 1918 and 1919, Kratz conducted at the Falls plant a series of tests with D. P. G. closely paralleling the series of tests which he had made in 1916 at the Norwalk plant and confirming those already reported as above. At Norwalk he had used mostly zinc oxide as part of the rubber mix, and he desired to verify the results obtained in tests of the same accelerators in other compounds of rubber with other than zinc oxide. All this was part of the preparation of his paper on accelerators to be read before the 1919 meeting of the American Chemical Society. The year before, he had attended the 1918 meeting of the Society expecting to hear the subject discussed, but nothing was said, and so he and his assist-

ant, Flower, gathered their material for a paper at the next meeting. That paper as read covered much more than the mere demonstration of the utility of D. P. G. as an accelerator. It dealt with a number of other accelerators also. The authenticity and reliability of Dr. Kratz's testimony about them is not questioned in this record. It is not too much to say that the report of Dr. Kratz's results made a great impression upon the rubber chemists of the country.

The only lack of corroboration of Kratz and the only challenge to his testimony of fact in this case is in reference to his account of sending to a customer the 300 inner tubes for automobile tires accelerated by D. P. G. He says that they were sent to the purchaser whose name he gives and that they proved to be satisfactory, as he knew by having tagged them and having received approval of the whole lot by the purchaser. He says that this was a special order; that he had at the time a small supply of D. P. G. which he himself had made; that these 300 tubes exhausted his supply, and that in filling the remainder another accelerator was used. This sale and the use of D. P. G. as an accelerator took place in August, 1917, as shown by the memoranda that Kratz produces. The record of the shipment of the 1,000 tubes, the memorandum shipping order by Kratz and the O. K. by the President of the Falls Company are introduced.

Kratz says he did not tell anyone of his use of D. P. G. in these 300 tubes. This is urged by respondent as a reason for discrediting it. Were this an isolated instance not taken out of the history of all of Kratz's relation to accelerators and to D. P. G., it might reasonably give rise to such question. But the undoubted fact that Kratz had demonstrated the utility of D. P. G. in his eight or nine tests in 1916 at Norwalk, and the corroboration of Dr. Russell as to his work there, and the memorandum which

he had taken with him of the tests and of the report, to the Falls Rubber Company, and, indeed, the reflexive corroboration of his paper at Philadelphia, show undoubtedly that he knew the excellence of D. P. G. as an accelerator, and tend to confirm his account as to the 300 tube sale. It was not unnatural that with a small amount of D. P. G. he should try it in a special order of this kind from which he might confirm the conclusion he had already reached. The effort to disprove it was vague and inconclusive, which, it is only fair to say, was to be expected five years after the event.

Kratz was not seeking a patent. He inferred, with reason, that D. P. G. would not make a successful business accelerator because of its then cost. He is wholly disinterested pecuniarily in the result of this case. The fact that he is the only witness is not fatal or any reason for denying the weight of his testimony in connection with other circumstances. *Reed* v. *Cutter,* 1 Story, 590, Fed. Cas. No. 11,645, 20 Fed. Cas. 435; *Coffin* v. *Ogden,* 18 Wall. 120; *Egbert* v. *Lippmann,* 104 U. S. 333.

But even if we ignore this evidence of Kratz's actual use of D. P. G. in these rubber inner tubes which were sold, what he did at Norwalk, supported by the evidence of Dr. Russell, his chief, and by the indubitable records that are not challenged, leaves no doubt in our minds that he did discover in 1916 the strength of D. P. G. as an accelerator as compared with the then known accelerators, and that he then demonstrated it by a reduction of it to practice in production of cured or vulcanized rubber.

This constitutes priority in this case. It was not followed by commercial use thereafter, because of the then cost of D. P. G. But this patent is for the mere discovery and application in the making of rubber of a particular accelerator. It was the fact that it would work with great activity as an accelerator that was the discovery, and

that was all, and the necessary reduction to use is shown by instances making clear that it did so work, and was a completed discovery. *Bedford* v. *Hunt,* 1 Mason 302, Fed. Cas. No. 1217, 3 Fed. Cas. 37; *Reed* v. *Cutter, supra; Gayler* v. *Wilder,* 10 How. 477; *Coffin* v. *Ogden, supra.*

It is said that these tests of Kratz were mere abandoned laboratory experiments. There was no abandonment in the sense that Kratz had given up what he was seeking for in demonstrating a new and effective accelerator in D. P. G. If he had been applying for a patent for the discovery, he clearly could have maintained proof of a reduction to practice. A process is reduced to practice when it is successfully performed. A machine is reduced to practice when it is assembled, adjusted and used. A manufacture is reduced to practice when it is completely manufactured. A composition of matter is reduced to practice when it is completely composed. Walker on Patents, § 141a. *Hunter* v. *Stikeman,* 13 App. D. C. 214, 226; *Mason* v. *Hepburn,* 13 App. D. C. 86, 92; *Lindemeyr* v. *Hoffman,* 18 App. D. C. 1, 5; *Roe* v. *Hanson,* 19 App. D. C. 559, 564.

Nor were the tests of Kratz abandoned laboratory experiments. If so, then the cure by Weiss, tested in February, 1919, was of the same character and was not of itself a reduction to use. Weiss showed his production of vulcanized rubber with D. P. G. in February, 1919, only by a so-called laboratory experiment. He demonstrated the value of D. P. G. as an accelerator by exactly the same kind of experiment as that which Kratz had used two years before. Weiss founded his claim on the cured slab of rubber which had been vulcanized with D. P. G., and this Kratz had done two years earlier with slabs of the same kind and composition deposited in the same way in a platen mold.

Kratz's method of testing his rubber slabs is criticized. As already said, it is the method known as the thumb and tooth test. This is not so exact a method in determining all the qualities that a test machine would show in the product, but it is, as already said, one very generally used for practical purposes in factories in determining that the vulcanization or cure is complete. It was the one by the use of which Kratz disclosed and demonstrated to the rubber chemists of the country who listened to him in September, 1919, that D. P. G. was an accelerator and how powerful it was as compared with others, and thereby revolutionized knowledge in the art, as the evidence abundantly shows, and as Weiss himself asserted in his application for employment in 1920. It is true that, in the test by Weiss of February 10, 1919, the details of tensile strength and time of cure and elasticity were disclosed by machine test, with more particularity, but the speed of the cure and the "activity" of D. P. G., and the fact of the cure, were clearly shown by the simpler test.

It is a mistake to assume that reduction to use must necessarily be a commercial use. If Kratz discovered and completed, as we are convinced that he did, the first use of D. P. G. as an accelerator in making vulcanized rubber, he does not lose his right to use this discovery when he chooses to do so, for scientific purposes or purposes of publication, because he does not subsequently sell the rubber thus vulcanized, or use his discovery in trade, or does not apply for a patent for it. It is not an abandoned experiment because he confines his use of the rubber thus produced to his laboratory or to his lecture room. It is doubtless true that Kratz, by his course in respect to his discovery as to the use of D. P. G., has abandoned any claim as against the public for a patent, but that is a very different thing from saying that it

was abandoned as against a subsequent discoverer or patentee.

The conclusion we reach then is that, so far as this record shows, the first discovery that D. P. G. was a useful accelerator of the vulcanization of rubber was made by George Kratz and not by Weiss.

We come then to the question of the validity of Claims 1, 5 and 9 of the patent, which seek to appropriate to the patentee the process of treating rubber by combining with the rubber compound "a disubstituted guanidine." Now the class of disubstituted guanidines includes not only D. P .G. but all other derivatives of guanidine in which two of the hydrogen atoms of the guanadine nucleus have been substituted by other groups. The fact that disubstituted guanidines have been used as accelerators appeared in an article published by one Du Bosc, July 15, 1919, a fact which would defeat the claims applied for November 24, 1921. Moreover, the experts show that there are between fifty and one hundred substances which answer this description, of which there is quite a number that are not accelerators at all. Weiss could certainly not claim the entire group of such compounds. He makes no showing that there is any general quality common to disubstituted guanidines which makes them all effective as accelerators. Claims for their exclusive use cannot therefore be sustained. This is shown by the decision of this Court in the *Incandescent Lamp Patent,* 159 U. S. 465, where the Court said, at page 475:

"If, as before observed, there were some general quality, running through the whole fibrous and textile kingdom, which distinguished it from every other, and gave it a peculiar fitness for the particular purpose, the man who discovered such quality might justly be entitled to a patent; but that is not the case here."

Reversed.

KRAUSS BROTHERS LUMBER COMPANY *v.* MELLON ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 342. Argued March 7, 1928.—Decided April 9, 1928.

Exhibits sent by the trial court to the reviewing court may be identified and made part of the bill of exceptions by appropriate reference in the bill itself. P. 391.
18 F. (2d) 369, reversed.

CERTIORARI, 275 U. S. 513, to a judgment of the Circuit Court of Appeals, which affirmed the judgment of the District Court in an action on a reparation order made by the Interstate Commerce Commission. The court below refused to pass on the merits, upon the ground that evidence involved was not in the bill of exceptions.

Mr. Brenton K. Fisk, with whom *Messrs. Harry S. Elkins* and *J. P. Mudd* were on the brief, for petitioner.

Mr. Alex. M. Bull, with whom *Messrs. Sidney P. Smith* and *Sidney F. Andrews* were on the brief, for respondents.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

Krauss Brothers Lumber Company is a corporation engaged in the wholesale lumber business, to whom the Interstate Commerce Commission, on the complaint of the company, ordered the respondent railroad companies, the Mobile & Ohio Railroad and the Alabama Great Southern Railroad Company, to pay reparation in the amount of $10,356 because of unlawful demurrage charges illegally collected. The sole issue was whether any such power had been vested in the Commission as would give it juris-

diction to decide that the charges should be refunded. Upon the Commission's decision that it had such power, the parties, following its suggestion, filed formal stipulations under Rule V of the Commission's practice admitting the amounts of the charges, the illegality of which had been declared by the Commission; and thereupon the reparation order was made.

The view of the defendants was that the Commission had no power to order a return of these demurrage charges, since by the common law, quite outside the functions and powers of the Commission, a carrier could reject a tender of goods for initial transportation while there were existing embargoes, and in the same way could reject a demand for reconsignment to points embargoed at the time of initial acceptance for shipment, and so demurrage had accrued until the consignees accepted actual delivery of the goods. Payment not having been made on or before December 28, 1922, as directed by the Commission, the present suit was filed by the petitioner as plaintiff against the respondents as defendants on March 20, 1923, in the United States District Court for the Northern District of Alabama. The complaint conformed to the provisions of § 16 of the Interstate Commerce Act, and contained the findings and order of the Commission as a part thereof.

The case came on for trial, demurrers to the complaint were overruled, additional counts were inserted by amendment and a demurrer to them was also overruled. Thereupon the shipper, as plaintiff, duly introduced in the evidence the Commission's original finding and other Commission proceedings, and closed its case. The respondents, over the shipper's objection that the same were incompetent, were permitted to put in evidence the original pleadings before the Commission, and the testimony and other exhibits taken and filed in the Commis-

sion's proceedings. Thereupon the respondents closed their case and the shipper duly moved for a directed verdict, which motion was overruled by the District Court and an exception noted. The respondents thereupon moved for a directed verdict, which motion was granted and the shipper duly excepted.

A writ of error from the Circuit Court of Appeals for the Fifth Circuit was then duly taken. The exhibits filed by the respondents were exceedingly voluminous, there being, among other things, a complete file of embargo circulars included as a part of the evidence which had been placed before the Commission in the hearings before it. The defeated party was anxious to avoid the printing of exhibits, which it did not deem of use to the reviewing court in passing on what it considered the only issue in the case, and attempted to secure this through stipulation of counsel and by an order of court. When the case reached the Circuit Court of Appeals, it declined to pass upon the merits of the case, for the following reason:

"From the above it is plain that all of the evidence upon which the case was tried is not in the bill of exceptions. The order of Court sending up the documents in the original does not purport to make them a part of the bill of exceptions, the rule of this court could not incorporate them therein, and the agreement of counsel expressly excludes them.

"As applicable to the deficiency of the record here shown the well settled rule is this. Depositions, exhibits or certificates not contained in the bill of exceptions can not be considered even though found in the printed transcript. The parties by their affidavits or agreements can not cause that to become a bill of exceptions which is not such in a legal sense. Where instructions of the court are assigned as error on a motion to direct a verdict or otherwise, unless the entire evidence pertinent to the

question is in the bill, the Appellate Court must presume that the omitted evidence justified the instruction."

Except as modified by statute, the rules as to bills of exceptions in the federal courts are the same as they were at common law. By § 17 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 83, all the courts of the United States were given power to grant new trials in cases where there had been a trial by jury, for reasons for which new trials had usually been granted in the courts of law. This was held to adopt the common law rule on the subject. *Parsons* v. *Bedford,* 3 Pet. 433. Prior to the statute of Westminster II, 13th Edw. I, ch. 31, a writ of error at common law could be had only for an error apparent on the face of the record, or for an error in fact such as the death of a party before judgment, but by that old statute, which is now to be treated as common law, it was provided that exceptions might, by bills of exceptions, be made a part of the record and so be reached by the writ of error. In this way so much of the facts of the case as was necessary to make plain the question of law on which the exception was founded, was incorporated in the record, but the trial justice, as a witness to the bill, had to put his seal to the instrument and, in the reviewing court, might be commanded to appear at a certain date either to confess or deny his seal, and then if he could not deny his seal the court of review proceeded to judgment according to the same exception as it ought to be allowed or disallowed. *Nalle* v. *Oyster,* 230 U. S. 165, 176, 177; *Duncan* v. *Landis,* 106 Fed. 839, 844; *Defiance Fruit Co.* v. *Fox,* 76 N. J. L. 482, 489.

By the Act of June 1, 1872, ch. 255, 17 Stat. 196, 197, it was provided that a bill of exceptions allowed in any cause should be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried or by the presiding judge thereof, if more than one judge sat

at the trial of the cause, without any seal of the court annexed thereto, and this became § 953 of the Revised Statutes. Since the passage of that Act, it is not necessary to seal a bill of exceptions. *Herbert* v. *Butler,* 97 U. S. 319, 320; *Maloney* v. *Adsit,* 175 U. S. 281, 285, but the signature is still necessary. *Origet* v. *United States,* 125 U. S. 240; *United States ex rel. Kinney* v. *United States Fidelity & Guaranty Co.,* 222 U. S. 283.

Strict requirements are thus insisted on so as to make certain that the reviewing court shall have before it an accurate account of the evidence or exhibits, which were before the trial court in the original hearing of the issues of the case, properly certified.

The same strictness prevails as to including in the bill the evidence upon which reliance is had to justify the exception, if not included in the original record. In many cases the error complained of rests on a negative showing that there was no evidence adduced at the trial upon which the ruling of the court complained of could be predicated. If a motion is made in the trial court to take the case from a jury, or other fact-finding tribunal, and direct a verdict or give judgment on the ground that, as a matter of law, only one verdict or judgment can be reached, it must appear that in the bill of exceptions is contained all the evidence actually adduced before the trial court. It has always been ruled in such a case that if the bill of exceptions does not contain all the evidence, it will be presumed that the evidence omitted was sufficient to justify a refusal to grant the motion. *Russell* v. *Ely,* 2 Black 575, 580; *City* v. *Babcock,* 3 Wall. 240, 244; *Grand Trunk Railway Co.* v. *Cummings,* 106 U. S. 700, 701; *Texas & Pacific Railway Co.* v. *Cox,* 145 U. S. 593, 606; *Hansen* v. *Boyd,* 161 U. S. 397, 403; *United States* v. *Copper Queen Mining Co.,* 185 U. S. 495, 498; *Nashua Savings Bank* v. *Anglo-American Co.,* 189 U. S. 221, 231. By

this it is not meant that the evidence shall be set forth at length in the words of the witnesses, and of the writings and documents admitted, but only that the purport and substance of all of it be included. In setting it forth, regard should be had to the requirements of paragraph 2 of Rule 4 of the Rules prescribed by this Court. 222 U. S., Appendix, p. 8. *Lincoln* v. *Claflin,* 7 Wall. 132, 136; *Zeller's Lessee* v. *Eckert,* 4 How. 289, 297, 298.

The question here arises because of the alleged omission of certain exhibits from the bill of exceptions, which the petitioner contended were not relevant to the issue. Because of this, the Circuit Court of Appeals, of its own motion, and not by request or consent of either party, applied the rule above stated. We do not think, however, that the bill of exceptions can be said to have omitted these exhibits or to have prevented the Circuit Court of Appeals from considering them with all the evidence. The bill of exceptions recites that in the trial both parties appeared by counsel, the jury was impaneled, and that there were introduced in evidence by the plaintiff exhibits 1, 2, 3, 4, 5 and 6, all as described; that they were admitted, subject to objection and exception as irrelevant, and the objection was overruled; and that the defendants offered exhibits No. 7, No. 8, No. 9, No. 10, No. 11 and No. 12, all as described, and as containing all the testimony, and also exhibits offered at the hearing before the Interstate Commerce Commission, and that the plaintiff objected to the introduction of all those exhibits from No. 7 to No. 12, and that this objection was overruled and an exception noted. The bill of exceptions then concluded as follows:

"The plaintiff's exhibits referred to as Exhibit No. 1, Exhibit No. 2, Exhibit No. 3, Exhibit No. 4, Exhibit No. 5, and the defendants' Exhibit No. 12 are hereinafter set forth fully as a part of this bill of exceptions. By virtue of an order of the Presiding Judge W. I. Grubb, plaintiff's

Exhibit No. 6 and the defendants' exhibits numbers 7, 8, 9, 10 and 11, respectively, are omitted from this bill of exceptions in order that they may be sent by the Clerk of the lower court, in compliance with the said order of the Presiding Judge, direct to the Court of Appeals.

"This was all the evidence in the case.

(Signed) W. I. GRUBB."

This was followed by the stipulation signed by the attorneys for both plaintiff and defendants, and the order of the Court, the latter being that referred to in the bill of exceptions, as follows:

"It appearing to the court that in this cause it is necessary and proper in the opinion of the court that certain original papers and documents should be inspected in the Circuit Court of Appeals upon writ of error by said court:

"It is therefore ordered that the following papers, to wit: Exhibits 6 to 11, inclusive, referred to and described in the bills of exceptions, be transmitted by the Clerk of this court to the Clerk of the Circuit Court of Appeals at New Orleans, La., and returned after the disposition of the writ of error to the Clerk of this Court.

"The parties to this cause by their respective counsel do hereby stipulate and agree as follows:

"That the plaintiff's exhibit No. 6 and that the defendants' exhibits 7, 8, 9, 10 and 11, may be omitted from the bill of exceptions, and sent by the Clerk of the trial court direct to the Court of Appeals in their original form, and further that the exhibits need not be printed in the record. This agreement is made in conformity with an order of the trial court by the presiding judge that said exhibits, viz: 6, 7, 8, 9, 10 and 11 shall be omitted from the record, and sent direct by the Clerk of the trial court to the Court of Appeals."

While the rule, as we have shown by its history, in respect to the inclusion of all the evidence in the bill of

exceptions must be respected, we must give the recitals of the bill a reasonable construction. *Kleinschmidt* v. *McAndrews,* 117 U. S. 282, 286; *Waldron* v. *Waldron,* 156 U. S. 361. While it may be said that the form in which this bill of exceptions is sent up is in its parts slightly inconsistent in itself and apparently self-contradictory, it is clear that the bill as signed by the trial judge, and read in the light of the order which is referred to and identified in the bill, brought and was intended to bring to the appellate court all of the evidence heard in the court below, and all the exhibits, even those said in it to be omitted therefrom which were *ex industria* sent by order of the court to the court above for that court's examination. We think that by the references in the bill the exhibits separately sent by order of the trial court to the Circuit Court of Appeals are sufficiently identified as part of the bill. They were omitted from the bill in the sense only that they were to be sent separately from the rest of the bill to the reviewing court, perhaps with a view, rightly or wrongly, to avoiding the necessity of printing them. But the certificate of the judge certainly included them in the bill when, after expressly referring to them, he said "This was all the evidence in the case." To be sure, it is well settled that exhibits found in the record, or even annexed to a bill of exceptions, when not attached to it by way of identifying them as intended to be part of it, can not be treated as such. *Bank* v. *Kennedy,* 17 Wall. 19, 29; *Reed* v. *Gardner,* 17 Wall. 409, 411; *Jones* v. *Buckell,* 104 U. S. 554; *Hanna* v. *Maas,* 122 U. S. 24.

But in *Leftwitch* v. *Lecanu,* 4 Wall. 187, on page 189, Mr. Justice Miller, while exemplifying this principle, said in rejecting a bill of exceptions:

"If a paper which is to constitute a part of a bill of exceptions, is not incorporated into the body of the bill,

it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions."

And again, in *Jones* v. *Buckell, supra,* at 556, Chief Justice Waite, in making a similar ruling, said:

" Of course, evidence may be included in a bill of exceptions by appropriate reference to other parts of the record, and if that had been done here it might have been enough."

As we have said, we think the identifying references, in the bill, to the exhibits are sufficient.

The result is that the Circuit Court of Appeals should have considered the issues before it on the bill of exceptions as containing all the evidence below, and that the dismissal for lack of it was erroneous.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings.

Reversed.

J. W. HAMPTON, JR., & COMPANY *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

No. 242. Argued March 1, 1928.—Decided April 9, 1928.

1. Section 315 (a), Title III, of the Tariff Act of Sept. 21, 1922, empowers and directs the President to increase or decrease duties imposed by the Act, so as to equalize the differences which, upon investigation, he finds and ascertains between the costs of producing at home and in competing foreign countries the kinds of articles to which such duties apply. The Act lays down certain criteria to be taken into consideration in ascertaining the differences, fixes certain limits of change, and makes an investigation by the Tariff Commission, in aid of the President, a necessary preliminary to any proclamation changing the duties.

Held that the delegation of power is not unconstitutional. P. 405.

2. Congress has power to frame the customs duties with a view to protecting and encouraging home industries. P. 411.

14 Ct. Cust. App. 350, affirmed.

CERTIORARI, 274 U. S. 735, to a judgment of the Court of Customs Appeals, which affirmed a judgment of the United States Customs Court, 49 Treas. Dec. 593, sustaining a rate of duty as increased by proclamation of the President.

Mr. Walter E. Hampton for petitioner.

The difference in cost of production at home and abroad cannot be found as a fact without using discretion and judgment, choice between different results, at every stage, thus expressing the exercise of the legislative will.

The fact that the cost of joint products and by-products cannot be separated except arbitrarily, that alone, and by itself, makes § 315 unconstitutional.

There is no magic about the word "finding." The act of making the "finding" itself has no creative power.

The complete breakdown of any argument from necessity as sanction for § 315, because Congress has itself been fixing tariff rates without difficulty, since the beginning, completely distinguishes the cases cited by the Government where the question of delegating legislative power was actually raised and discussed by this Court. *Buttfield* v. *Stranahan,* 192 U. S. 470; *Waite* v. *Macy,* 246 U. S. 606, T. D. 37647; *United States* v. *Grimaud,* 220 U. S. 506; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177; *Hannibal Bridge Co.* v. *United States,* 221 U. S. 194; *United States* v. *Chemical Foundation,* 272 U. S. 1; *Field* v. *Clark,* 143 U. S. 649; *In re Brig Aurora,* 7 Cranch 382.

The expression in sub-section C, "the President in so far as he finds it practicable shall take into consideration . . . any other advantages or disadvantages in com-

petition," in itself, renders § 315 unconstitutional. On account of its presence alone, we submit, this Court should declare the section unconstitutional without even considering the question of the unconstitutionality of the " difference in cost of production " formula.

The court below makes the fatal admission that the difference in cost of production at home and abroad cannot be precisely established, and further that a discretion is bestowed on the President as to how he shall find such cost differences.

The *Countervailing Duty* cases, *Downs* v. *United States,* 187 U. S. 496, and *Nicholas* v. *United States,* 249 U. S. 34, do not support the legality of § 315.

In countervailing duty, Congress itself provides that whenever any country gives a bounty, rebate or grant upon the exportation of merchandise dutiable under our tariff, an additional duty " equal to the net amount of such bounty or grant " shall be levied on such merchandise upon importation here.

The appraisement cases have no place in this discussion. The distinction between executing or applying an existing ad valorem to a particular importation on the day of exportation, and making a new rate of taxation to apply in the future by changing an existing tariff rate, should be self-evident. The fact that some kind of cost calculations occasionally crept into finding ad valorem market value, would not make the two processes similar in any respect. One still applies an existing rate and the other fixes a new tax rate for the future.

A non justiciable subject-matter, such as this, cannot be made into a judicial process, nor can the ultimate duty be laid upon the courts, by review of this machinery, to take part in fixing the tax rate. Consequently the Interstate Commerce Commission cases which deal with a justiciable subject-matter are not in point and are not authority for the legality of a flexible tariff.

The currency cases do not support the Government's position. *Cramer* v. *Arthur,* 102 U. S. 612; *Arthur* v. *Richards,* 90 U. S. 259; *Hadden* v. *Merritt,* 115 U. S. 25; *United States* v. *Klingenberg,* 153 U. S. 93. Congress has a right to place any value for customs purposes it pleases on foreign money. It authorized the Secretary of the Treasury to proclaim such value for a year and from quarter to quarter, thus coming nearer the true value, and being a fairer way of doing it. It was plain that Congress could not pass such a currency valuation statute every quarter. Many months Congress is not even in session. To thus relax the arbitrary rule and make it less arbitrary was not delegating legislative power or taxing power.

The *Chemical Foundation* case, 272 U. S. 1, is not in point.

A levy frankly stated to be for the purpose of protection, irrespective of revenue, is illegal. *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; *Loan Association* v. *Topeka,* 20 Wall. 655.

Had there been no tax clause in the Constitution, could § 315 have been enacted under the power to regulate commerce? But even if Congress can tax under the commerce clause alone, it cannot make a levy for a private purpose. A tax to equalize foreign and domestic cost differences is not in any rational sense of the word a regulation of commerce. Commerce cannot be regulated for a frankly declared private purpose.

The President cannot be delegated the authority to levy taxes for the regulation of commerce any more than he can be delegated authority to levy taxes for the raising of revenue.

On the other hand, assuming, for the purpose of the argument only, that the section is a legal delegation, the commerce clause gives it no support or sanction as being on its face for the private purpose of "protection" to

certain purely domestic industries. Otherwise the commerce clause could be invoked as authority for a direct subsidy out of the public treasury paid to domestic manufacturers to make up "cost differences." Such a duty levied to meet "cost differences" no more affects commerce than such a direct subsidy paid to make up such differences.

We are dealing here with a limitation on the powers of Congress not to delegate to the executive the power of legislation or the power of taxation. This limitation is not to be destroyed by an implication expanding the powers which it expressly limits. *Fairbank* v. *United States,* 181 U. S. 283; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *I. C. C.* v. *Brimson,* 154 U. S. 447.

Even if Congress can tax under the commerce clause, such tax must still be laid by Congress itself, without delegation to executive authority, and such tax must still be levied for the "general welfare," and not for a private purpose plainly expressed upon the face of the statute.

Solicitor General Mitchell, with whom *Assistant Attorney General Lawrence* and *Messrs. Marion De Vries,* Special Assistant to the Attorney General, and *Robert P. Reeder,* Attorney in the Department of Justice, were on the brief, for the United States.

The statute does not attempt an unlawful delegation of legislative authority. It delegates to the President the power to find facts, not the power to make law. He is to determine, with the assistance of the Commission, the domestic and foreign costs of production and the difference between them. The rules to be applied to the facts so found, in order to determine the new rate of duty, are prescribed by the statute. Congress may delegate to others a fact-finding power which the legislature may

rightfully exercise itself. Although Congress cannot delegate its power to make the law, it can make a law delegating a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. The rule of law prescribed by this statute is, that within the limits fixed in the statute, tariffs shall be adjusted to equalize the difference in the costs of production of foreign and domestic merchandise.

That in some case such costs may not be ascertainable, does not make the statute invalid, but merely renders it inoperative in the particular case. That there may be difficulty in ascertaining the exact costs of production does not render it invalid. Because of limits fixed by the statute upon changes in rates, exact costs of production are not necessary to be known in the majority of cases. In them it is enough to know that the costs are not less in some cases or more in others than stated amounts. The discretion left to the President under this statute is a discretion in matters of fact and in respect of the weight of evidence, and not as to the rules or principles to be applied. *The Brig Aurora,* 7 Cranch 382; *Wayman* v. *Southard,* 10 Wheat. 1; *Field* v. *Clark,* 143 U. S. 649; *Miller* v. *Mayor of New York,* 109 U. S. 385; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Red "C" Oil Mfg. Co.* v. *North Carolina,* 222 U. S. 380; *Interstate Commerce Comm.* v. *Goodrich Transit Co.,* 224 U. S. 194; *Mutual Film Corp'n* v. *Ohio Industrial Comm.,* 236 U. S. 230; *Mutual Film Corp'n* v. *Kansas,* 236 U. S. 258; *United States* v. *Grimaud,* 220 U. S. 506.

It is too late in the day to question the power of Congress to protect American industry, through the operation of laws imposing duties on imports. In the first session of the first Congress, the second law placed on the

statute books (Act of July 4, 1789, c. 2, 1 Stat. 24) declared that the duties there named were imposed not only for the support of the Government and to pay debts, but also for the encouragement and protection of manufacturers.

Congress has power not only to tax foreign commerce, but to regulate it. *Buttfield* v. *Stranahan,* 192 U. S. 492. See also *The Abby Dodge,* 223 U. S. 166; *Brolan* v. *United States,* 236 U. S. 216; *Weber* v. *Freed,* 239 U. S. 325; *Yee Hem* v. *United States,* 268 U. S. 178; *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320; *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348.

Mr. Chief Justice Taft delivered the opinion of the Court.

J. W. Hampton, Jr., & Company made an importation into New York of barium dioxide, which the collector of customs assessed at the dutiable rate of six cents per pound. This was two cents per pound more than that fixed by statute, par. 12, ch. 356, 42 Stat. 858, 860. The rate was raised by the collector by virtue of the proclamation of the President, 45 Treas. Dec. 669, T. D. 40216, issued under, and by authority of, § 315 of Title III of the Tariff Act of September 21, 1922, ch. 356, 42 Stat. 858, 941, which is the so-called flexible tariff provision. Protest was made and an appeal was taken under § 514, Part 3, Title IV, ch. 356, 42 Stat. 969–70. The case came on for hearing before the United States Customs Court, 49 Treas. Dec. 593. A majority held the Act constitutional. Thereafter the case was appealed to the United States Court of Customs Appeals. On the 16th day of October, 1926, the Attorney General certified that in his opinion the case was of such importance as to render expedient its review by this Court. Thereafter the judgment of the United States Customs Court was affirmed.

14 Ct. Cust. App. 350. On a petition to this Court for certiorari, filed May 10, 1927, the writ was granted, 274 U. S. 735. The pertinent parts of § 315 of Title III of the Tariff Act, ch. 356, 42 Stat. 858, 941 U. S. C., Tit. 19, §§ 154, 156, are as follows:

"Section 315(a). That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations, such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act. . . .

"(c). That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differ-

ences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

"Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

"The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified."

The President issued his proclamation May 19, 1924. After reciting part of the foregoing from § 315, the proclamation continued as follows:

"Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to . . . barium dioxide, . . .

"Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

"And whereas the President upon said investigation . . . has thereby found that the principal competing country is Germany, and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in . . . Germany, and has ascertained and determined the increased rate of duty necessary to equalize the same.

"Now, therefore, I, Calvin Coolidge, President of the United States of America, do hereby determine and proclaim that the increase in the rate of duty provided in said act shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

"'An increase in said duty on barium dioxide (within the limit of total increase provided for in said act) from 4 cents per pound to 6 cents per pound.

"'In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"'Done at the City of Washington this nineteenth day of May in the year of our Lord one thousand nine hundred and twenty-four, and of the Independence of the

United States of America the one hundred and forty-eighth.

"'Calvin Coolidge.

"'By the President: Charles E. Hughes, Secretary of State.'"

The issue here is as to the constitutionality of § 315, upon which depends the authority for the proclamation of the President and for two of the six cents per pound duty collected from the petitioner. The contention of the taxpayers is two-fold—first, they argue that the section is invalid in that it is a delegation to the President of the legislative power, which by Article I, § 1 of the Constitution, is vested in Congress, the power being that declared in § 8 of Article I, that the Congress shall have power to lay and collect taxes, duties, imposts and excises. The second objection is that, as § 315 was enacted with the avowed intent and for the purpose of protecting the industries of the United States, it is invalid because the Constitution gives power to lay such taxes only for revenue.

First. It seems clear what Congress intended by § 315. Its plan was to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties not only secure revenue but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States. It may be that it is difficult to fix with exactness this difference, but the difference which is sought in the statute is perfectly clear and perfectly intelligible. Because of the difficulty in practically determining what that difference is, Congress seems to have

doubted that the information in its possession was such as to enable it to make the adjustment accurately, and also to have apprehended that with changing conditions the difference might vary in such a way that some readjustments would be necessary to give effect to the principle on which the statute proceeds. To avoid such difficulties, Congress adopted in § 315 the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out this policy and plan, and to find the changing difference from time to time, and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan. As it was a matter of great importance, it concluded to give by statute to the President, the chief of the executive branch, the function of determining the difference as it might vary. He was provided with a body of investigators who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments. There was no specific provision by which action by the President might be invoked under this Act, but it was presumed that the President would through this body of advisers keep himself advised of the necessity for investigation or change, and then would proceed to pursue his duties under the Act and reach such conclusion as he might find justified by the investigation, and proclaim the same if necessary.

The Tariff Commission does not itself fix duties, but before the President reaches a conclusion on the subject of investigation, the Tariff Commission must make an investigation and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard.

The well-known maxim "*Delegata potestas non potest delegari,*" applicable to the law of agency in the general and common law, is well understood and has had wider

application in the construction of our Federal and State Constitutions than it has in private law. The Federal Constitution and State Constitutions of this country divide the governmental power into three branches. The first is the legislative, the second is the executive, and the third is the judicial, and the rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations. *United States* v. *Grimaud,* 220 U. S. 506, 518; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Buttfield* v.

Stranahan, 192 U. S. 470; *In re Kollock,* 165 U. S. 526; *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320.

Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district. As Judge Ranney of the Ohio Supreme Court in *Cincinnati, Wilmington and Zanesville Railroad Co.* v. *Commissioners,* 1 Ohio St. 77, 88, said in such a case:

"The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." See also *Moers* v. *Reading,* 21 Penn. St. 188, 202; *Locke's Appeal,* 72 Penn. St. 491, 498.

Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Com-

mission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given, and not discriminatory. As said by this Court in *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 214, "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

The principle upon which such a power is upheld in state legislation as to fixing railway rates is admirably stated by Judge Mitchell, in the case of *State* v. *Chicago, Milwaukee & St. Paul Railway Company,* 38 Minn. 281, 298 to 302. The learned Judge says on page 301:

"If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject, and who, after investigation of the facts, can fix rates with reference to the peculiar circumstances of each road, and each particular kind of business, and who can change or modify these rates to suit the ever-varying conditions of traffic. . . . Our legislature has gone a step further than most others, and vested our commission with full power to determine what rates are equal and reasonable in each particular case. Whether this was wise or not is not for us to say; but in doing so we can not see that they have transcended their constitutional authority. They have not delegated to the commission any authority or discretion as to what the law

shall be,—which would not be allowable,—but have merely conferred upon it an authority and discretion, to be exercised in the execution of the law, and under and in pursuance of it, which is entirely permissible. The legislature itself has passed upon the expediency of the law, and what it shall be. The commission is intrusted with no authority or discretion upon these questions." See also the language of Justices Miller and Bradley in the same case in this Court. 134 U. S. 418, 459, 461, 464.

It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress, and authorize such officers in the application of the Congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority. This conclusion is amply sustained by a case in which there was no advisory commis-

sion furnished the President—a case to which this Court gave the fullest consideration nearly forty years ago. In *Field* v. *Clark*, 143 U. S. 649, 680, the third section of the Act of October 1, 1890, contained this provision:

"That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea and hides, the product of or exported from such designated country as follows, namely:"

Then followed certain rates of duty to be imposed. It was contended that this section delegated to the President both legislative and treaty-making powers and was unconstitutional. After an examination of all the authorities, the Court said that while Congress could not delegate legislative power to the President, this Act did not in any real sense invest the President with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to the determination of the President; that the legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What

the President was required to do was merely in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

Second. The second objection to § 315 is that the declared plan of Congress, either expressly or by clear implication, formulates its rule to guide the President and his advisory Tariff Commission as one directed to a tariff system of protection that will avoid damaging competition to the country's industries by the importation of goods from other countries at too low a rate to equalize foreign and domestic competition in the markets of the United States. It is contended that the only power of Congress in the levying of customs duties is to create revenue, and that it is unconstitutional to frame the customs duties with any other view than that of revenue raising. It undoubtedly is true that during the political life of this country there has been much discussion between parties as to the wisdom of the policy of protection, and we may go further and say as to its constitutionality, but no historian, whatever his view of the wisdom of the policy of protection, would contend that Congress, since the first revenue Act, in 1789, has not assumed that it was within its power in making provision for the collection of revenue, to put taxes upon importations and to vary the subjects of such taxes or rates in an effort to encourage the growth of the industries of the Nation by protecting home production against foreign competition. It is enough to point out that the second act adopted by the Congress of the United States, July 4, 1789, ch. 2, 1 Stat. 24, contained the following recital.

"SEC. 1. Whereas it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manu-

factures, that duties be laid on goods, wares and merchandises imported: Be it enacted, etc."

In this first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions. *Myers* v. *United States*, 272 U. S. 52, 175, and cases cited. The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection, since the revenue law of 1789, are matters of history.

More than a hundred years later, the titles of the Tariff Acts of 1897 and 1909 declared the purpose of those acts, among other things, to be that of encouraging the industries of the United States. The title of the Tariff Act of 1922, of which § 315 is a part, is "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States and for other purposes." Whatever we may think of the wisdom of a protection policy, we can not hold it unconstitutional.

So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes can not invalidate Congressional action. As we said in the *Child Labor Tax Case*, 259 U. S. 20, 38: "Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive."

And so here, the fact that Congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country in the competition with producers in other countries in the sale of goods in this country, can not invalidate a revenue act so framed. Section 315 and its provisions are within the power of Congress. The judgment of the Court of Customs Appeals is affirmed.

Affirmed.

CASEY v. UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 500. Argued January 11, 1928.—Decided April 9, 1928.

1. Where evidence in a criminal trial tends to prove inferentially that the offence was within the venue, and supplementary evidence on that point might be produced if attention were called to it, objection that the venue has not been established should be made specifically and not rested upon a general request to direct a verdict for want of sufficient evidence. P. 417.
2. Section 1 of the Anti-Narcotic Act in providing that absence of the required stamps from any of the drugs shall be prima facie evidence of a violation of the section by the person in whose possession such drugs are found, is merely a regulation of the burden of proof. P. 418.
3. This provision is constitutional as applied to a person charged with unlawful purchase of morphine who possessed the drug under circumstances warranting suspicion. P. 418.
4. Upon the evidence in this case, the court, acting on its own motion, would not be justified in deciding that the Government induced the crime. P. 418.
5. The amended Anti-Narcotic Act, as applied to this case, is within the power of Congress. P. 420.

20 F. (2d) 752, affirmed in part.

CERTIORARI, 275 U. S. 517, to a judgment of the Circuit Court of Appeals, affirming a conviction under the Anti-

Narcotic Act. The affirmance here is on the first count of the indictment, charging unlawful purchase. The second count, charging sales, was also upheld below, but in this Court was conceded to be bad by the Government.

Mr. John T. Casey for petitioner.

Count 1 does not state facts sufficient to show a violation. There is no allegation that petitioner failed to purchase the 3.4 grains of morphine "from a registered dealer in pursuance of a prescription." Interstate and interdistrict travel and communication are so constant and universal, that to presume that morphine was purchased in the district where it is found in one's possession would be irrational. The conclusion reached by the Circuit Court of Appeals on this point in opposition to the Seventh and Eighth Circuits should be reversed.

Mere possession of 3.4 grains of morphine, even if admitted, would not constitute a violation of the Act, whether the venue is included or not. The presumption is made only against dealers who are required to register and pay the special tax. It being now conceded that defendant is not such a person, an unlawful purchase cannot be presumed against him even if he possessed the small amount of morphine charged in Count 1. *United States* v. *Jin Fuey Moy,* 241 U. S. 864; *Linder* v. *United States,* 268 U. S. 5; *Johnson* v. *United States,* 294 Fed. 753; *Lewis* v. *United States,* 295 Fed. 678; *Hampton* v. *Wong Ging,* 299 Fed. 289; *Lamento* v. *United States,* 4 F. (2d) 901.

There is no legitimate or believable evidence of possession, upon which to presume a purchase, either lawful or unlawful. It is the truth that defendant never possessed a single grain of morphine in his life.

The Harrison Act is unconstitutional. *Linder* case, 268 U. S. 5. It was conceded by the government in the *Jin Fuey Moy* case, 241 U. S. 394, that it was passed for the purpose of carrying out the recommendations of the

International Opium Convention. Hence, the chief object of Congress was, not to raise revenue, but to stamp out what was regarded as a nefarious traffic. *Doremus* case, 249 U. S. 86; *Child Labor Tax Case,* 259 U. S. 20; *United States* v. *Daugherty,* 269 U. S. 360; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Hill* v. *Wallace,* 259 U. S. 44.

Solicitor General Mitchell, with whom *Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely,* Attorney in the Department of Justice, were on the brief, for the United States.

Count 2 of the indictment charged a failure to register and pay the tax as a dealer. The statute expressly provides that only those who sell or dispense the drugs from original stamped packages are dealers and required to pay the occupation tax. In this case there was no proof that the accused was dealing in stamped drugs. The evidence showed that he dealt in unstamped drugs, and the verdict of guilty under Count 1 was based on that fact. Under these conditions the conviction under Count 2 should not be sustained. *Weaver* v. *United States* 15 F. (2d) 38; *O'Neill* v. *United States,* 19 F. (2d) 322; *Butler* v. *United States,* 20 F. (2d) 570.

The statute should be construed to make possession of unstamped drugs prima facie evidence of the place as well as the fact of unlawful purchase, and so construed it is not invalid. The charge in Count 1 was purchase of drugs not in or from stamped packages. The proof showed possession of drugs not in stamped packages. To sustain the charge of unlawful purchase the United States was obliged to rely upon the presumption created by the statute. The presumption includes not only the fact of purchase but the place of purchase, so as to support the venue. *Brightman* v. *United States,* 7 F. (2d) 532 and *Cain* v. *United States,* 12 F. (2d) 580, *contra.* See also *DeMoss* v. *United States,* 14 F. (2d) 1021.

It would be a rare case where the prosecution could prove the place of an unlawful purchase without at the same time proving the fact of the unlawful purchase, and if the fact of the purchase must be proved the statutory presumption is worthless. A statute should not be given a construction producing unreasonable results if it may be avoided. *United States* v. *Katz,* 271 U. S. 354. Construed as we contend it should be, the statute is not unconstitutional. *Mobile, etc., R. R.* v. *Turnipseed,* 219 U. S. 35; *Yee Hem* v. *United States,* 268 U. S. 178; *O'Neill* v. *United States,* 19 F. (2d) 322.

The venue point was sufficiently raised by motion to direct a verdict. While the record does not show that it was or was not mentioned expressly in pressing the motion it was called to the attention of the trial court in a motion for a new trial.

Mr. Justice Holmes delivered the opinion of the Court.

The petitioner, Casey, was convicted upon two counts of an indictment, the first of which charged him with the purchase of three and four-tenths grains of morphine not in or from the original stamped package, at Seattle, within the jurisdiction of the Court. The conviction was sustained by the Circuit Court of Appeals. 20 F. (2d) 752. A writ of certiorari was granted by this Court.

Here the second count was admitted by the Government to be bad, so that the only matter to be considered is whether the conviction can be sustained upon the first. It is argued that the evidence is not enough.—Casey had practised law in Seattle for many years, had been in the habit of visiting King County jail and had defended prisoners addicted to the use of narcotics. There was evidence tending to show that on different occasions he had promised to furnish them with opiates and that in pur-

suance of such promises and for pay received by him he had given or sent to them preparations of morphine, concealed, it was said, by soaking towels or the like in a solution of the drug. If this evidence was believed it showed that Casey was in possession or control of what he sent and it safely may be inferred that he did not proclaim his illegal purpose by putting stamps upon the towels. But the charge is a purchase, not a sale. There was no testimony directly concerning the purchase and the Government relies in part at least upon the presumption of a violation of § 1 of the Act of December 17, 1914, c. 1, as amended by the Act of February 24, 1919, c. 18, § 1006; 40 Stat. 1057, 1130, 1131, that that section purports to create. U. S. C. Title 26, § 692.

The amended section makes the purchase, sale &c., of opium and derivatives unlawful except in or from the original stamped package, and the absence of the required stamps from any of the said drugs 'shall be prima facie evidence of a violation of this section by the person in whose possession same may be found.' For the petitioner it was argued that the presumption thus created does not and, consistently with the Sixth Amendment to the Constitution, cannot extend so far as to show a purchase within the district and thus to bring the case within the the jurisdiction of the trial Court. The Circuit Court of Appeals answered that the objection to the venue was not raised specifically below. The Court was asked to direct a verdict for the defendant on the ground that the evidence was not sufficient and elsewhere it has been held that such a request is enough to save the question, and that a presumption extended to the place of purchase could not be upheld. *Brightman* v. *United States,* 7 F. (2d) 532. *Cain* v. *United States,* 12 F. (2d) 580. *Hood* v. *United States,* 14 F. (2d) 925. *De Moss* v. *United States,* 14 F. (2d) 1021. But we are of opinion that upon

the facts of this case the Court was right. If the jury believed that the defendant, long established in Seattle, said that he had not the drug but would, and shortly thereafter did, furnish it, the inference that he bought it in Seattle is strong, and it is reasonable to suppose that if attention had been called to the point the inference could have been made stronger still. But the effort of the defence did not stop at this detail but was to show that Casey had nothing to do with the business and was wholly innocent of the offence charged.

With regard to the presumption of the purchase of a thing manifestly not produced by the possessor, there is a 'rational connection between the fact proved and the ultimate fact presumed.' *Luria* v. *United States,* 231 U. S. 9, 25; *Yee Hem* v. *United States,* 268 U. S. 178, 183. Furthermore there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. *Greer* v. *United States,* 245 U. S. 559. The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Evidence, § 2494. It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government. 4 Wigmore, Evidence, § 2486. In dealing with a poison not commonly used except upon a doctor's prescription easily proved, or for a debauch only possible by a breach of law, it seems reasonable to call on a person possessing it in a form that warrants suspicion to show that he obtained it in a mode permitted by the law.—The petitioner cannot complain of the statute except as it affects him.

We do not feel at liberty to accept the suggestion that the Government induced the crime. A Court rarely can

act with advantage of its own motion, and very rarely can be justified in giving judgment upon grounds that the record was not intended to present. Upon this record, it was testified and might have been found for the Government that after Casey's visits addicts were noticed by the jailers to be under the influence of narcotics and that on a previous occasion Casey for money had got morphine at the request of Cicero, the supposed stool pigeon. It does not appear expressly that this last was told to the jailer before the supposed plot to entrap Casey, but in view of the relation between the parties it was very likely—and had the matter been in issue very probably would have been proved. We do not think that we are entitled to assume the contrary. If known to the jailers there was very probable cause to believe Casey an habitual practitioner. His own language when he was on guard, admitting that he frequently had promised the drug to prisoners, the testimony as to what was said in his presence (to the effect that he was the man who supplied the boys with narcotics when they wanted it) and his language importing habit, (as, that he hadn't a thing with him today) all tend to the same conclusion. We hardly can assume that the jailers did not know the facts in order to convict them of a gross wrong, when we keep in mind that the case was tried and the record made up without this in mind. Furthermore Casey according to the story was in no way induced to commit the crime beyond the simple request of Cicero to which he seems to have acceded without hesitation and as a matter of course. According to the evidence he seems to have promised morphine to Nelson, who does not appear to have been in the supposed plot. We are not persuaded that the conduct of the officials was different from or worse than ordering a drink of a suspected bootlegger. Whatever doubts we may feel as to the truth of the testimony we are not at liberty to consider them on the only question

before the Court. The grounds for uneasiness can be considered only by another power.

The statute is much more obviously a revenue measure now than when *United States* v. *Doremus*, 249 U. S. 86, was decided, and is said to produce a considerable return. *Alston* v. *United States*, 274 U. S. 289, 294. It is too late to attempt to overthrow the whole act on *Child Labor Tax Case*, 259 U. S. 20. It is said also that no opium is produced in the United States, and at all events the statute has been so modified that now at least *United States* v. *Jin Fuey Moy*, 241 U. S. 394, does not apply to this case. *United States* v. *Wong Sing*, 260 U. S. 18, 21. We pass as not needing discussion some minor points.

Judgment upon the first count affirmed.

Mr. Justice McReynolds, dissenting.

I accept the views stated by Mr. Justice Butler. With clarity he points out the unreasonableness of the construction of the statute advocated by counsel for the United States. But I go further.

The provision under which we are told that one may be presumed unlawfully to have purchased an unstamped package of morphine within the district where he is found in possession of it conflicts with those constitutional guaranties heretofore supposed to protect all against arbitrary conviction and punishment. The suggested rational connection between the fact proved and the ultimate fact presumed is imaginary.

Once the thumbscrew and the following confession made conviction easy; but that method was crude and, I suppose, now would be declared unlawful upon some ground. Hereafter, presumption is to lighten the burden of the prosecutor. The victim will be spared the trouble of confessing and will go to his cell without mutilation or disquieting outcry.

Probably most of those accelerated to prison under the present Act will be unfortunate addicts and their abettors; but even they live under the Constitution. And where will the next step take us?

When the Harrison Anti-Narcotic Law became effective probably some drug containing opium could have been found in a million or more households within the Union. Paregoric, laudanum, Dover's Powders, were common remedies. Did every man and woman who possessed one of these instantly become a presumptive criminal and liable to imprisonment unless he could explain to the satisfaction of a jury when and where he got the stuff? Certainly, I cannot assent to any such notion, and it seems worthwhile to say so.

MR. JUSTICE BUTLER concurs in these views.

MR. JUSTICE BRANDEIS, dissenting.

The question presented is whether possession within the district of morphine not in the original stamped package is evidence sufficient to sustain the charge that it was illegally purchased therein. I have no occasion to consider that question. For, in my opinion, the prosecution must fail because officers of the Government instigated the commission of the alleged crime.

These are facts disclosed by the Government's evidence. In the Western District of Washington, Northern Division, prisoners awaiting trial for federal offences are commonly detained at King County Jail. The prisoners' lawyers frequently come there for consultation with clients. At the request of prisoners, the jailer telephones the lawyers to come for that purpose. A small compartment—called the attorneys' cage—is provided. Prior to the events here in question, the jailer had, upon such request, telephoned Casey, from time to time, to come to see prisoners accused of crimes other than violation of the

Narcotic Act. He had doubtless telephoned also upon request of prisoners who were accused of these crimes. For Casey had acted as attorney in a number of narcotic cases. The jailer observed—or thought he did—that after Casey came, some of those visited were under the influence of narcotics. He suspected that Casey had brought them the drug. To entrap him, the following scheme was devised by Patterson and Close, federal narcotic officers, and carried out with the aid of George Cicero, a convicted felon and drug addict, then in the jail on a charge of forgery, and Mrs. Nelson, the alleged sister-in-law of Roy Nelson, another prisoner and drug addict.

On December 29th, Patterson and Close installed a dictaphone in the attorneys' cage and arranged so that, from an adjacent room, they could both hear conversations in the cage and see occupants. Then they deposited with the superintendent of the jail $20 to Cicero's credit; arranged with him to request the jailer to summon Casey to come to the jail; and also that, when Casey came, Cicero would ask him to procure some morphine and would pay him the $20 for that purpose. The jailer telephoned Casey as requested. Thereafter the federal agents were in waiting. Casey did not come until about 10 o'clock on the morning of the 31st. Cicero talked from the attorneys' cage with Casey and gave him an order for the $20. By arrangement, Casey talked there also with Roy Nelson, who gave him an order on the superintendent for $50. Both orders were immediately cashed. Mrs. Nelson talked with Casey in the corridor.

The testimony of Patterson, Close, Cicero and Mrs. Nelson, if believed, is sufficient to prove that Cicero and Roy Nelson asked Casey to procure morphine for them; that he agreed to do so; that the money paid was for that purpose; that it was arranged that the morphine should be smuggled into the jail in laundry; and that

Mrs. Nelson arranged with Casey that she would call at his office in the afternoon. She did call, having first gone to the office of the narcotic agents and conferred with them. She testified that she saw at Casey's office a Chinaman or a Japanese; that Casey gave her the package for Roy Nelson; and that she took it immediately to the federal narcotic office. A federal narcotic agent who is a chemist testified that upon soaking one of the towels in the package brought to the office by Mrs. Nelson he found that it contained morphine.

I am aware that courts—mistaking relative social values and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish, sanctioned the use of evidence obtained through criminal violation of property and personal rights or by other practices of detectives even more revolting. But the objection here is of a different nature. It does not rest merely upon the character of the evidence or upon the fact that the evidence was illegally obtained. The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature. If Casey is guilty of the crime of purchasing 3.4 grains of morphine, on December 31st, as charged, it is because he yielded to the temptation presented by the officers. Their conduct is not a defence to him. For no officer of the Government has power to authorize the violation of an Act of Congress and no conduct of an officer can excuse the violation. But it does not follow that the court must suffer a detective-made criminal to be punished. To permit that would be tantamount to a ratification by the Government of the

officers' unauthorized and unjustifiable conduct.[1] Compare *Gambino* v. *United States*, 275 U. S. 310.

This case is unlike those where a defendant confessedly intended to commit a crime and the Government having knowledge thereof merely presented the opportunity and set its decoy. So far as appears, the officers had, prior to the events on December 31st, no basis for a belief that Casey was violating the law, except that the jailer harbored a suspicion. Casey took the witness stand and submitted himself to cross-examination. He testified that he had "never bought, sold, given away or possessed a single grain of morphine or other opiate" and that he had "never procured, or suggested to anyone else to procure morphine or narcotics of any kind." He testified that the payments made on orders from Cicero and Roy Nelson were payments on account of services to be rendered as counsel for the defence in the prosecutions against them then pending. He denied every material fact testified to by witnesses for the prosecution and supported his oath by other evidence. The Government's witnesses admitted that the conversations in the attorneys' cage were carried on in the ordinary tone of voice; that there was no effort to lower the voice or to speak privately or secretly; and that they could have heard all that was said without the use of the dictaphone. They admitted that when the narcotic agents searched Casey's office under a search

[1] *United States* v. *Adams*, 59 Fed. 674; *Woo Wai* v. *United States*, 223 Fed. 412; *Sam Yick* v. *United States*, 240 Fed. 60, 65; *Voves* v. *United States*, 249 Fed. 191; *Peterson* v. *United States*, 255 Fed. 433; *United States* v. *Lynch*, 256 Fed. 983; *Butts* v. *United States*, 273 Fed. 35; *United States* v. *Certain Quantities, etc.*, 290 Fed. 824; *Newman* v. *United States*, 299 Fed. 128; *Capuano* v. *United States*, 9 F. (2d) 41; *Silk* v. *United States*, 16 F. (2d) 568; *Jarl* v. *United States*, 19 F. (2d) 891; *Cline* v. *United States*, 20 F. (2d) 494. See also *Di Salvo* v. *United States*, 2 F. (2d) 222; *United States* v. *Washington*, 20 F. (2d) 160, 162. Compare *Blaikie* v. *Linton*, 18 Scot. L. R. 583.

warrant, on the evening of December 31st, they did not find any narcotics or any trace of them or any other incriminating article; and that when, at about the same time, they arrested Casey, he was taking supper with his wife and daughter at his home seven miles from Seattle. Whether the charge against Casey is true, we may not enquire. But if under such circumstances, the mere suspicion of the jailer could justify entrapment, little would be left of the doctrine.

The fact that no objection on the ground of entrapment was taken by the defendant, either below or in this Court, is without legal significance. This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts. In my opinion, the judgment should be vacated with direction to quash the indictment. Compare *United States* v. *Healy,* 202 Fed. 349, 350; *United States* v. *Echols,* 253 Fed. 862.

MR. JUSTICE BUTLER concurs in this opinion.

MR. JUSTICE BUTLER, dissenting.

The first count charges an unlawful purchase of 3.4 grains of morphine. The second charges unlawful sales. Defendant was convicted on both and sentenced to the penitentiary for fourteen months on each, the terms to run concurrently. The Circuit Court of Appeals affirmed the judgment on both counts. Here the Government rightly says that the conviction on the second count should not be sustained. This Court accepts that view and, as to that count, petitioner is entitled to have the judgment reversed.

The indictment is under § 1 of the Harrison Narcotic Act of December 7, 1914, c. 1, 38 Stat. 785, as amended

February 24, 1919, c. 18, 40 Stat. 1057, 1131. It was enacted under Art. 1, § 8 of the Constitution granting to Congress power to lay and collect taxes. The words of the section under which the first count was found are:

"It shall be unlawful for any person to purchase . . . any of the aforesaid drugs except in . . . or from the original stamped package . . . ."

The essential substance of the first count follows:

Thomas J. Casey on the 31st day of December, 1925, at Seattle, Washington, did unlawfully purchase from a person unknown, and not in or from the original stamped package 3.4 grains of morphine.

By far the larger part of the testimony heard related to the second count and was not admissible to prove the purchase alleged in the first. That evidence can not fairly be brought forward now to sustain conviction on the first count.

Mere purchase or possession of morphine is not crime. Congress has not attempted, and has no power, to make either an offense. The gist of accusation is purchase of 3.4 grains of morphine that was not in or taken from a stamped package when delivered to defendant. That is the *corpus delicti*.

There was testimony sufficient to sustain a finding that defendant at the time and place specified, had possession of 3.4 grains of morphine. But there was no evidence to show how, when or where or from whom he got it. There is much difference between such a possession and the crime charged. A statutory provision is invoked in lieu of evidence to bridge this gap. It is found in the twelfth paragraph of the section; and, in order to show the immediate environment of the words relied on, the first three clauses of the paragraph are quoted.

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except

in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax: "

This section defines many offenses. They include purchasing, selling, dispensing, distributing, importing, manufacturing, producing, compounding, dealing in, administering and giving away of each of the numerous drugs mentioned in the section. The things forbidden are not alike. Some are essentially different from and inconsistent with the others. It can not reasonably be said that mere possession of 3.4 grains of morphine without a stamp thereon was sufficient to establish *prima facie* that defendant was guilty of all these crimes, or all that related to morphine or even to those respectively involving manufacture, sale and purchase of the 3.4 grains. There is no more reason to select one of these than there is to choose another for the application of the statutory rule of evidence.

The " absence of appropriate tax-paid stamps " cannot be said to make out dissimilar and inconsistent offenses. Tax-paid stamps are significant to show payment of taxes and their absence under some circumstances properly may be evidence of non-payment. According to its words, the clause in question merely makes such absence " prima facie evidence of a violation of this section," the clause following makes possession of an original stamped package containing the drug by one not registered, evidence of liability for a tax. Fairly considered both clauses have to do with tax liability. The first to the tax on the drug, and the second to the tax imposed on importers, dealers,

physicians, etc. That construction would be reasonable and would not stretch the law against those accused of the crimes created by the section.

And it is always to be remembered that this Act is to be construed as a measure to "lay and collect taxes." It has no other legal existence. The tax is one cent on each ounce or fractional part thereof. Defendant had 3.4 grains without a stamp on it. He is not accused of failure to pay a tax. The unlawful purchase charged is punishable by a fine of not more than $2,000 or by imprisonment of not more than five years or by both. U. S. C., Tit. 26, § 705. The only legal justification for such penalties is that they are calculated to aid collection of taxes. It is hard to continue to say that this Act is a taxing measure in order to sustain it. Eagerness to use federal law as a police measure to combat the opium habit—a purpose for which Congress has no power to legislate—should not lead to the enactment or the construction of laws that shock common sense.

And above all, the statutory rule of evidence should be construed having regard to the ancient and salutary doctrine known and rightly cherished as fair play by the people, the bar and the courts of this country, that every person on trial for crime is presumed to be innocent; and, that in order to convict him, the evidence must satisfy the jury beyond reasonable doubt that he is guilty of the crime charged. See *Coffin* v. *United States,* 156 U. S. 432, 453. *Cochrane and Sayre* v. *United States,* 157 U. S. 286, 298. *Davis* v. *United States,* 160 U. S. 469. The connection, if any, between the possession shown and the substance of the offense charged is too remote. Attention has not been called to any decision that goes so far. None can be found.

There is no evidence in the record that reasonably tends to show that defendant purchased the 3.4 grains of morphine or that, when purchased, it was not in or taken from the original stamped package.

I am of opinion that the judgment should be reversed.

MR. JUSTICE SANFORD, dissenting.

I think that the case is not made out by the statutory provision as to *prima facie* evidence, and that the judgment should be reversed.

CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* LEITCH.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 98. Argued March 14, 1928.—Decided April 9, 1928.

A locomotive engineer assumes the risk of being struck by a mail crane or mail sack hanging from it (*Southern Pacific Co.* v. *Berkshire,* 254 U. S. 415), even though placed some inches closer to the track than the general plan for the railroad provided, no unquestionable disregard of obvious precautions being shown. P. 430.

101 W. Va. 230, reversed.

CERTIORARI, 273 U. S. 678, to a judgment of the Supreme Court of Appeals of West Virginia, sustaining a recovery in an action under the Federal Employers' Liability Act.

Mr. Douglas W. Brown for petitioner.

Mr. John H. Holt, with whom *Messrs. George B. Martin* and *Rufus S. Dinkle* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action brought by the respondent, an engineer, to recover from the petitioner for injuries suffered by him through contact with a mail crane, or mail sack hanging from it, as he looked from the window of his engine, upon the petitioner's road. There is no doubt that the case is governed by the Federal Employers' Liability Act, but the respondent got a verdict in the State Court which was sustained by the Supreme Court of Appeals, 101 W. Va., 230, and the question is whether there is any sufficient distinction between this and *Southern Pacific Co.* v. *Berkshire,* 254 U. S. 415, in which it was held that the engineer took the risk. The grounds of that decision were that it is impracticable to require railroads to have no structures so near to their tracks as to endanger persons who lean from the windows of the cars; that they are obliged to erect mail cranes near enough to the tracks for the train to pick up mail sacks without stopping; that it is almost if not quite impossible to set the cranes so far away as to leave no danger to one leaning out, and that in dealing with a well known incident of the employment, adopted in the interest of the public, it is unreasonable to throw the risk of it upon those who were compelled to adopt it.

Of course it is answered that these general considerations should not exonerate the railroads from using such care as they can within the conditions. But it seems to us unjust to let the risk of a danger that in any event is imminent vary upon disputed evidence that the danger was brought an inch or two nearer than it would have been if a blue print adopted for the whole line had been followed with a more precisely mathematical accuracy. In the *Berkshire* case the testimony for the plaintiff left a distance of fourteen inches from the end of the crane to the car. Here the plaintiff's witness makes it ten. The

witnesses for the petitioner with greater plausibility make it appreciably more. If there is to be a standard in these cases, and if, as decided, the general rule is that the engineer takes the risk, the railroad should not be made liable for this class of injury except where some unquestionable disregard of obvious precautions is shown. The plaintiff here, as in *Berkshire's* case, well knew of the existence of the crane, which had been in place for three or four years. He was an experienced engineer and, although here as there presumably he never had measured the distance, he like Berkshire knew the fact that threatened danger. At the trial Leitch testified that he was looking to see the position of a block signal, pointedly contradicting a statement that he dictated and signed near the time of the accident. He admitted, however, that it was the fireman's business to look out for the block and notify him, and the fireman's more favorable position for seeing and other circumstances sufficiently indicate that there was no great or sudden emergency, if that would affect the case. Without discussing the evidence in detail we are satisfied upon a consideration of it that it does not show grounds for making an exception to the general rule.

Judgment reversed.

LARKIN *v.* PAUGH ET AL.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA

No. 137. Argued December 9, 1927.—Decided April 9, 1928.

1. Rev. Stats., § 2448, providing that where a patent for "public lands" shall issue in pursuance of any law of the United States, to a person who has died before the date of the patent, the title shall inure to, and become vested in, the "heirs, devisees, or assignees" of the deceased patentee as if the patent had issued to him during life, *held* applicable where an Indian holding land by "trust patent" under the General Allotment Act, applied to the Secretary of the Interior, under the Act of March 1, 1907, for a

fee simple patent, and the patent was issued some days after the Indian's death. P. 437.

2. Whether the term "public lands" applies to allotments held in trust for Indians, depends upon the nature and object of the particular statute in which the term is employed. P. 438.
3. Rev. Stats., § 2448, is highly remedial, and patents to Indians are not less within its reason than patents to white men. P. 438.
4. By reason of this statute, the fee simple patent operated to invest the Indian's heirs, devisees or assignees with the title and to divest the United States of it, as if the patent had issued to him during life; and the recipients of the title took it as though from him directly and not as immediate grantees of the United States. P. 438.
5. Issuance of the patent terminated the prior trust and the incidental restriction on alienation, and also the authority possessed by the Secretary of the Interior by reason of them, so that all questions pertaining to the title became subject to examination and determination by the courts,—appropriately those in the State where the land was situate. P. 439.
6. Therefore, the proper state court had jurisdiction to determine that a contract to sell the land, made by the Indian in anticipation of the patent, was valid and that, by reason of its partial performance while the Indian was living, his vendee became an assignee and the contract legally and equitably enforcible as against the heirs. The heirs have no federal right to have the judgment re-examined and vacated on a collateral attack. P. 439.

Affirmed.

CERTIORARI, 275 U. S. 507, to a judgment of the Supreme Court of Nebraska, which reversed a decree canceling a deed made by the administrator of the estate of a deceased Indian.

Mr. Jay A. Larkin, pro se.

Mr. Karl J. Knoepfler, with whom *Messrs. Edwin J. Stason* and *E. S. Ripley* were on the brief, for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This case presents a controversy over the title to land which in 1901 was allotted to Lewis Greyhair, a Winne-

bago Indian, and for which in 1902 he received a trust patent. The suit was brought in the district court of Thurston County, Nebraska, where the land lies. The plaintiff claimed under a deed from the allottee's heirs, and the defendants under a deed from his administrator. In the district court the plaintiff prevailed, but in the Supreme Court of the State the decision was for the defendants. The case was brought here on writ of error; but we dismissed that writ and granted a writ of certiorari, because the only federal questions involved relate to the construction and operation of certain congressional statutes, rather than to their validity, Judicial Code, § 237, as amended February 13, 1925, c. 229, 43 Stat. 936.

The land was allotted to Greyhair under the act of February 8, 1887, c. 119, 24 Stat. 388, which provided in § 5 that the trust patent should declare, as in fact it did, that the United States would hold the land for the period of 25 years in trust for the sole use and benefit of the allottee, or, in case of his decease, of his heirs according to the laws of the State, and at the expiration of that period would convey the same by patent to the allottee, or his heirs, in fee, discharged of such trust and free from all charge or incumbrance. The act further provided in the same section that any conveyance of the land, or contract touching the same, made before the termination of the trust period should be absolutely null and void.

These provisions were qualified by a later one in the act of March 8, 1906, c. 2348, 34 Stat. 182, authorizing the Secretary of the Interior, " whenever he shall be satisfied that any Indian allotee is competent and capable of managing his or her affairs," to terminate the trust period and the incidental restriction against alienation by issuing to such allottee a patent in fee simple; and they were further qualified by a provision in the act of March 1, 1907, c. 2285, 34 Stat. 1018, permitting an allottee to sell all or

any part of his allotment during the existence of the restriction against alienation, if the Secretary of the Interior approved.

March 12, 1916, Greyhair made written application for the issue to him of a fee simple patent under the provision in the Act of 1906, and as reasons therefor he set forth with some corroborative detail that in point of education, experience and habits he was well able to manage his own affairs; that he was in poor health and in need of money; that the land was worth $3,600 and was the only property owned by him which readily could be sold; and that he was not residing on it but on other property belonging to him. The superintendent of the Winnebago Agency approved the application and forwarded it to the Indian Office in Washington with a statement giving the value of the land as $3,200, confirming what Greyhair said of himself and adding: "Greyhair is a very sick man in need of hospital care and special medical attention that we are not able to give him. He needs money and needs it at once. The quickest way we know to get it is to ask the Office to grant a patent in fee on his allotment."

A month later Greyhair, being without response to his application, sent a telegram to the Indian Office saying: "Am sick. Need hospital attention. Am without means until I get patent to allotment. Superintendent informs me that he has asked for quick approval of application that I may get treatment. Please hasten and answer by wire." The Assistant Commissioner then wrote to the superintendent stating that the Indian Office had submitted the application to the Secretary of the Interior with favorable recommendation; that when it was returned by the Secretary the Indian Office would give it immediate attention; and that—"Meanwhile you may make such arrangements as your acquaintance with all the facts in the case justify looking to sale of the allotment

and the assistance of Greyhair to such extent as his necessities may require."

The superintendent received that letter April 29 and immediately informed Greyhair of its contents. Later in the same day Greyhair and his wife, with the approval of the superintendent, entered into a written contract with one Osborn to sell the land to him for $3,520 and to give a deed promptly after the issue of a fee simple patent. Of the agreed purchase price $2,120 was paid when the contract was signed and $1,400 was to be paid when the deed was given. The contract recited that it was made in conformity with the instructions given to the superintendent in the letter of the Assistant Commissioner; and the superintendent endorsed his approval on the contract.

Greyhair died intestate the next day, April 30, leaving as his only heirs his widow and three minor children. A few days later the Secretary of the Interior found from the application and accompanying papers that Greyhair was competent and capable of managing his affairs, and accordingly directed that he be given a fee simple patent as prayed in the application. The patent was issued May 19, 1916.

August 3, 1916, the county court appointed an administrator of Greyhair's estate; and later in that month the administrator brought a suit in equity in a local court of general jurisdiction against the heirs and Osborn, conformably to a local statute,[1] to accomplish specific performance of the contract. Among other things the petition in that suit set forth the contract, disclosed that Greyhair had died the day after making it and showed that a fee simple patent to him was issued after his death The heirs and Osborn were all brought in by both personal

[1] Com. St. Neb. 1922, c. 15, art. IX; *Solt* v. *Anderson,* 62 Neb. 153, 157; *Solt* v. *Anderson,* 67 Neb. 103, 107.

service and public notice. The widow and Osborn answered and consented that the prayer of the petition be granted. The children answered through a guardian *ad litem* and called for full proof. A hearing resulted in the entry of a decree authorizing and directing the administrator, on receiving from Osborn the unpaid balance of the purchase price, to execute and deliver to him a deed in fulfillment of the contract. An appeal to the Supreme Court was admissible under the local law, but none was taken. The balance of the purchase price was duly paid, and on April 9, 1917, the administrator executed and delivered the deed to Osborn. The latter then entered into possession and he and his grantees have been in possession ever since.

May 31, 1922, the heirs of Greyhair—the minors then having attained their majority—made a deed purporting to convey the land to the plaintiff, an attorney at law, who knew of the administrator's deed and of the defendants' claim under it. The deed to the plaintiff recited a consideration of $1,000 "in hand paid"; but the real consideration was $80 paid in cash and a conditional promise to pay $920 more—if and when the plaintiff was adjudged by the "court of final jurisdiction" to have the title.

After receiving the deed from the heirs the plaintiff brought the present suit to cancel the administrator's deed and some later conveyances passing all title under it to the defendants. The plaintiff took the position that Greyhair's contract to sell was void because made without the approval of the Secretary of the Interior and in violation of the restriction against alienation imposed by the act of 1887; that under that act and other congressional statutes the title was held in trust by the United States up to the time of Greyhair's death and then passed to his heirs unaffected by any act of his; and that his administrator had

no authority over the land and the local court was without jurisdiction to render the decree for the performance of the contract to sell. The trial court sustained that position and accordingly entered a decree of cancellation.

The Supreme Court was of opinion that the fee simple patent, although actually issued after Greyhair's death, should be regarded as if issued during his life, and that, so regarding it, "there could be no question" that the local court "had jurisdiction" to render the decree for the performance of the contract or that the administrator's deed given under the decree "passed a valid title." On these grounds the decree of cancellation was reversed.

It was plainly implied in this decision that the administrator's suit to accomplish performance of the contract was sanctioned by the local statute, and also that, there being full jurisdiction the decree therein was not open to collateral attack and was conclusive on the parties and their privies, including the plaintiff in the present suit who claims under a subsequent deed from the heirs.[2]

The court's conclusion that the patent should be regarded as if issued during the life of Greyhair was rested on the equitable doctrine of relation. We think there is no need to consider that doctrine; for the operation of the patent is controlled by an early congressional statute,[3] still in force, which provides:

"Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein

[2] See *Spear* v. *Tidball*, 40 Neb. 107; *Stenberg* v. *State ex rel.*, 48 Neb. 299, 316; *Dowell* v. *Applegate*, 152 U. S. 327, 343, *et seq.*; *United States* v. *California & Oregon Land Co.*, 192 U. S. 355; *Marin* v. *Augedahl*, 247 U. S. 142, 149, *et seq.*

[3] Act May 20, 1836, c. 76, 5 Stat. 31; § 2448 Rev. Stat.; § 1152, Title 43, U. S. Code.

shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during his life."

The court noticed this statute, but was of opinion that it "applies to homestead entries and not to Indian allotments." This, we hold, is a mistaken view. The statute was in force long before homestead entries were permitted; and it has been held by this Court to be applicable to patents for Indian selections made under an Indian treaty, *Crews* v. *Burcham,* 1 Black 352, 356, and to patents for Indian allotments made under an Act of Congress, *United States* v. *Chase,* 245 U. S. 89, 101. True, it uses the term "public lands," which seldom is employed as including lands selected for or allotted to Indians. But the term sometimes is used in a sense which includes such lands where the United States has retained the title. This is illustrated in *Kindred* v. *Union Pacific R. R. Co.,* 225 U. S. 582, 596, and *Nadeau* v. *Union Pacific R. R. Co.,* 253 U. S. 442, 444. The question usually is one of intention, considering the nature and object of the particular statute. Here the statute is highly remedial, in that it is designed to relieve from the prior rule that a patent issued after the death of the grantee is inoperative and void. *Davenport* v. *Lamb,* 13 Wall. 418, 427. Patents to Indians are not less within the reason for the statute than patents to white men; and we think its letter may and should be taken as including both, as was done in *Crews* v. *Burcham* and *United States* v. *Chase.*

We conclude that by reason of this statute the fee simple patent to Greyhair, although issued 19 days after his death, operated to invest his "heirs, devisees or assignees" with the title, and to divest the United States of it, "as if" the patent had been issued to him "during life." Of course those who received the title, whether heirs, devisees or assignees, took it as though it came

from him, and not as if they were the immediate grantees of the United States. See *Harris* v. *Bell,* 254 U. S. 103, 108. The statute leaves no room for doubt on this point.

With the issue of the patent, the title not only passed from the United States but the prior trust and the incidental restriction against alienation were terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction—so that thereafter all questions pertaining to the title were subject to examination and determination by the courts, appropriately those in Nebraska, the land being there. *Brown* v. *Hitchcock,* 173 U. S. 473; *Lane* v. *Mickadiet,* 241 U. S. 201, 207, *et seq.*

Under the statute the title did not necessarily go to the heirs. Devisees or assignees, if having a lawful claim, would come first; and there well might be a question as to who were the heirs, or whether there were devisees or assignees having a better right. Such questions would be among those which might be taken into the courts. The contention to the contrary is without support in the congressional statutes to which our attention is invited. They all relate to lands held under trust patents or subject to restriction against alienation, and not to such as have been freed from the trust and restriction, as here, by the issue of a fee simple patent.

We are of opinion therefore that there was nothing in the congressional statutes to prevent the local court from taking and exercising jurisdiction of the administrator's suit for specific performance, brought after the issue of the fee simple patent. Of course we accept the ruling of the Supreme Court that there was no want of jurisdiction under the state laws.

As the local court had jurisdiction, that enabled it to decide every question of fact or law arising in the suit, including the questions whether Greyhair's contract to

sell to Osborn was valid or invalid in the circumstances in which it was made, and whether by reason of its partial performance while Greyhair was living Osborn became an assignee in such a sense that the contract legally and equitably might be enforced as against the heirs. These questions inhered in the suit and necessarily were resolved against the heirs by the decree for enforcement. No effort was made to have the decree reviewed or vacated in any direct proceeding. The attack made on it in the present suit was collateral. Certainly there was no federal right to have it reëxamined or vacated on such an attack.

Judgment affirmed.

UNTERMYER, EXECUTRIX, ET AL. *v.* ANDERSON, COLLECTOR.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 221. Argued February 27, 1928.—Decided April 9, 1928.

1. The gift tax provisions of the Revenue Act, approved June 2, 1924 (see *Blodgett* v. *Holden*, 275 U. S. 142), must be construed as applying to gifts made at any time during that calendar year. P. 445.
2. So far as applicable to bona fide gifts not made in anticipation of death, and fully consummated prior to June 2, 1924, those provisions are arbitrary and invalid under the Due Process Clause of the Fifth Amendment. *Id.*
3. The mere fact that a gift was made while the bill containing the questioned provisions was in the last stage of progress through Congress is not enough to differentiate this cause from the former one and to relieve the legislation of its arbitrary character. P. 445.

18 F. (2d) 1023, reversed.

CERTIORARI, 274 U. S. 730, to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court in favor of the Collector, in an action against him to recover an amount collected as a gift tax.

Mr. Louis Marshall for petitioners.

A gift made during the calendar year 1924 and prior to June 2, 1924, when the Act of 1924 became law, was not made taxable by that Act; but if intended that it should be, the Act, in so far as it related to a gift so made, was void because in violation of the Fifth Amendment. *Blodgett* v. *Holden,* 275 U. S. 142; *Anderson* v. *McNeir,* 16 F. (2d) 970; *Shwab* v. *Doyle,* 258 U. S. 529; *Union Trust Co.* v. *Wardell,* 258 U. S. 537; *Levy* v. *Wardell,* 258 U. S. 542; *Knox* v. *McElligott,* 258 U. S. 546; *Reynolds* v. *McArthur,* 2 Pet. 417; *United States* v. *Field,* 255 U. S. 257; *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602; *Llewellyn* v. *Frick,* 268 U. S. 238; *Nichols* v. *Coolidge,* 274 U. S. 531.

The tax violates the Fifth Amendment in that it deprives the donor of his property without due process of law. *Wynehamer* v. *People,* 13 N. Y. 396; *Sherman* v. *Elder,* 24 N. Y. 381; *Chicago etc. R. R. Co.* v. *Englewood Ry. Co.,* 115 Ill. 375; *Jaynes* v. *Omaha Street Ry. Co.,* 53 Neb. 631; *Smith* v. *Campbell,* 10 N. C. 595; *Eaton* v. *B. C. & M. R. R.,* 51 N. H. 504; *Buchanan* v. *Warley,* 245 U. S. 60.

The rules which appertain to a testamentary disposition of property, or to a right of inheritance, or to a so-called estate tax, have no relation to a gift *inter vivos* not made in contemplation of death. *Knowlton* v. *Moore,* 178 U. S. 41; *Magoun* v. *Illinois Savings & Trust Co.,* 170 U. S. 281; *Blackstone* v. *Miller,* 188 U. S. 200.

Section 319 is in no manner based upon the theory that the gift tax is imposed for the purpose of preventing the donor from evading the estate tax imposed by the Revenue Act of 1924, or by any predecessor acts based upon that theory.

If the gift was made in contemplation of death, the subject-matter, under the conditions specified in § 302 (c), (d), would be treated as a part of the estate of the

decedent, and, thus, taxable. The tax upon a gift *inter vivos* and not in contemplation of death may not come within the scope of these provisions. *Schlesinger* v. *Wisconsin,* 270 U. S. 230.

The gift tax is not payable by the donee, but by the donor, and is, therefore, clearly not a succession, estate or inheritance tax or a death duty, but a tax upon the exercise of the constitutional right of the donor to give away his property.

Nor is this tax similar to a stamp tax imposed upon the transfer of shares in a corporation. The latter is a creature of government. The transfer of its shares is necessarily made with the sanction of government. Hence the imposition of a stamp duty is based upon the idea that a privilege is conferred upon the transferror. *People ex rel. Hatch* v. *Reardon,* 184 N. Y. 431, aff'd 204 U. S. 152; *Thomas* v. *United States,* 192 U. S. 363.

Nor can it be sustained as a tax within the rule laid down in *Nicol* v. *Ames,* 173 U. S. 509, which related to a tax imposed upon the sale of property pursuant to transactions at an exchange or board of trade.

The tax imposed is a direct tax and void because not apportioned as required by Article I, § 2, Clause 3, of the Constitution.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, were on the brief, for respondent.

The case of *Blodgett* v. *Holden* did not decide that the gift tax provisions of the Revenue Act of 1924 were not retroactive, or that its application to all gifts made prior to June 2, 1924, was unconstitutional.

To tax the gift here involved is not to make the law so arbitrary as to be unconstitutional. The provision had been under discussion in Congress for three months, had

been passed by both Houses, had been sent to conference, and the conference had reported the bill containing the provisions. It was not until then that Mr. Untermyer made the gift. It is not an unfair inference that he had knowledge of these facts and that it was his intention to avoid the tax, if possible, before the bill should become law by the approval of the President. He had an undoubted right to seek to avoid payment of the tax by making the gift before the Act took effect. The only question is, was it arbitrary and capricious and confiscatory to tax a gift thus made? It would not be so regarded in England. Halsbury's Laws of England, Vol. 27, p. 182, § 352; *Hume* v. *Haig,* (1799) 8 Bro. Parl. Cas. 196; Provisional Collection of Taxes Act, 1913 (3 Geo. 5, c. 3). See also Vol. 24, p. 537, Halsbury's Laws of England.

This case is not like that of *Nichols* v. *Coolidge,* 274 U. S. 531. There the Act of Congress reached back and dealt with a transfer which took place a dozen years before the law was passed and attributed to the property its value long after the transfer.

Neither federal nor state legislation is unconstitutional because it is retroactive. *Calder* v. *Bull,* 3 Dall. 386; *The Peggy,* 1 Cranch, 103; *Prize Cases,* 2 Black 635; *Johannessen* v. *United States,* 225 U. S. 227; *Satterlee* v. *Matthewson,* 2 Pet. 380; *Curtis* v. *Whitney,* 13 Wall. 68; *Kentucky Union Co.* v. *Kentucky,* 219 U. S. 140.

This Court has sustained state tax laws which were retroactive in scope. *Carpenter* v. *Pennsylvania,* 17 How. 456; *Orr* v. *Gilman,* 183 U. S. 278; *Locke* v. *New Orleans,* 4 Wall. 172; *Seattle* v. *Kelleher,* 195 U. S. 351; *State* v. *Bell,* 61 N. C. 76.

It has sustained similar federal taxes. *Stockdale* v. *Insurance Companies,* 20 Wall. 323, followed in *Railroad Co.* v. *Rose,* 95 U. S. 78. See *Billings* v. *United States,* 232 U. S. 261; *Brushaber* v. *Union Pacific R. R. Co.,* 240

U. S. 1; *Railroad Co.* v. *Collector,* 100 U. S. 595; *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107; *Hecht* v. *Malley,* 265 U. S. 144.

A tax upon transfers of property by gift is not a direct tax, but an excise. Apparently the only legal equivalent of a tax on the general ownership of property is a tax on the income from such property.

Mr. Ira Jewell Williams filed a brief as *amicus curiae* by special leave of Court.

Mr. Justice McReynolds delivered the opinion of the Court.

By the original action commenced in the United States District Court, Southern District of New York, Isaac Untermyer sought to recover of the U. S. Collector of Internal Revenue the tax exacted of him, under the Act of June 2, 1924,—§§ 319, *et seq.*,—on account of a gift which he made May 23, 1924. After his death the cause was revived in the name of the executors—petitioners herein—and was then heard upon an agreed statement of facts. Both sides moved for a directed verdict. Judgment went for the Collector and was affirmed by the Circuit Court of Appeals.

The questions now presented for consideration are similar to those involved in *Blodgett* v. *Holden,* 275 U. S. 142.

The two causes differ in this: Blodgett's gifts were made during January, 1924, before the provisions for taxing such transfers were presented for the consideration of Congress; Untermyer made his gift May 23, 1924, some three months after those provisions were first presented and while the conference report upon the bill was pending. This report went to the Senate May 22, 1924, and three days thereafter the bill had finally passed

both houses. The President approved it on June 2, 1924.

Unless the difference in circumstances stated is material, the same rule of law must govern both cases.

Two opinions were announced in *Blodgett* v. *Holden.* The one prepared by the present writer, expressed the views of four of the eight Justices who participated in the consideration of the cause. After quoting the pertinent provisions of the statute, etc., the opinion declared: "So far as the Revenue Act of 1924 undertakes to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment." We need not now further repeat what was there set out.

In the light of arguments advanced by counsel in the present cause, the matter has been considered by all members of the Court, and a majority of them are of opinion that the gift tax provisions of the Act of 1924 here challenged must be construed as applicable to gifts made during the entire calendar year 1924. And, further, that so far as applicable to bona fide gifts not made in anticipation of death and fully consummated prior to June 2, 1924, those provisions are arbitrary and invalid under the due process clause of the Fifth Amendment.

The mere fact that a gift was made while the bill containing the questioned provisions was in the last stage of progress through Congress we think is not enough to differentiate this cause from the former one and to relieve the legislation of the arbitrary character there ascribed to it. To accept the contrary view would produce insuperable difficulties touching interpretation and practical application of the statute, and render impossible proper understanding of the burden intended to be imposed. The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and

ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken.

The judgment below must be reversed.

Reversed.

MR. JUSTICE SANFORD concurs in the result.

MR. JUSTICE HOLMES, dissenting.

As I think the construction of the Act of June 2, 1924, c. 234, § 319, adopted by four of us in *Blodgett* v. *Holden*, 275 U. S. 142, the proper one, I shall not go into the question of constitutionality beyond saying that I find it hard to state to myself articulately the ground for denying the power of Congress to lay the tax. We all know that we shall get a tax bill every year. I suppose that the taxing act may be passed in the middle as lawfully as at the beginning of the year. A tax may be levied for past privileges and protection as well as for those to come. *Wagner* v. *Baltimore*, 239 U. S. 207, 216. *Billings* v. *United States*, 232 U. S. 261, 282. *Seattle* v. *Kelleher*, 195 U. S. 351. *Stockdale* v. *Atlantic Insurance Co.*, 20 Wall. 323. I do not imagine that the authority of Congress to tax the exercise of the legal power to make a gift will be doubted any more than its authority to tax a sale. Apart from its bearing upon construction and constitutionality I am not at liberty to consider the justice of the Act.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE agree with this opinion.

MR. JUSTICE BRANDEIS, with whom MR. JUSTICE HOLMES and MR. JUSTICE STONE concur.

To what MR. JUSTICE HOLMES has said, I add this. The Court construes the Act as applying to all gifts made

during the calendar year. Then it holds the Act void as applied to a gift made during the ten-day period between the submission of the Conference Report to Congress and the approval of the Act by the President. It holds the Act void because the action of the law-making body is, in its opinion, unreasonable. Tested by the standard of reasonableness commonly adopted by man—use and wont—that action appears to be reasonable. Tested by a still higher standard to which all Americans must bow—long continued practice of Congress repeatedly sanctioned by this Court after full argument—its validity would have seemed unquestionable, but for views recently expressed. No other standard has been suggested.

For more than half a century, it has been settled that a law of Congress imposing a tax may be retroactive in its operation. *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331; *Railroad Co.* v. *Rose,* 95 U. S. 78, 80; *Railroad Co.* v. *United States,* 101 U. S. 543, 549; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Billings* v. *United States,* 232 U. S. 261, 282; *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1, 20; *Lynch* v. *Hornby,* 247 U. S. 339, 343; *Hecht* v. *Malley,* 265 U. S. 144, 164. Each of the fifteen income tax acts adopted from time to time during the last sixty-seven years has been retroactive, in that it applied to income earned, prior to the passage of the act, during the calendar year.[1] The Act of October

[1] The Act of August 5, 1861, c. 45, 12 Stat. 292, 309, applied to all incomes for the calendar year next preceding January 1, 1862. The Act of July 1, 1862, c. 119, 12 Stat. 432, 473, enacted higher rates, applicable to incomes for the year ending December 31, 1862. The Joint Resolution of July 4, 1864, No. 77, 13 Stat. 417, imposed an additional tax of 5% on incomes for 1863 which had already been taxed at the rates established by the Act of 1862. The Act of June 30, 1864, c. 173, 13 Stat. 223, 281, applied to incomes for the then current calendar year. The Act of March 3, 1865, c. 78, 13 Stat. 469, 479, which again raised the rates, applied to income for the year end-

3, 1913, c. 16, 38 Stat. 114, 166, which taxed all incomes received after March 1, 1913, was specifically upheld in *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 20, and in *Lynch* v. *Hornby*, 247 U. S. 339, 343. Some of the acts have taxed income earned in an earlier year. The Joint Resolution of July 4, 1864, No. 77, 13 Stat. 417, imposed an additional tax on incomes earned during the calendar year 1863, this additional tax being imposed after the taxes for the year had been paid. In *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331, Mr. Justice Miller said: "No one doubted the validity of the tax or attempted to resist it." The Act of February 24, 1919, c. 18, Title II, 40 Stat. 1057, 1058–1088, which taxed incomes for the calendar year 1918, was applied, without question as to its constitutionality, in *United States* v. *Robbins*, 269 U. S. 315, and numerous other cases.

The Corporation Tax Act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112, applying to all net income for the calendar year, was sustained in *Flint* v. *Stone Tracy Co.*, 220

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ing December 31, 1865. The Act of March 2, 1867, c. 169, 14 Stat. 471, 477, also applied to income for the current calendar year. The Act of July 14, 1870, c. 255, 16 Stat. 256, 257, taxed incomes for the year commencing January 1, 1870, though the Acts of June 30, 1864, c. 173, 13 Stat. 223, 283, of July 13, 1866, c. 184, 14 Stat. 98, 138, and of March 2, 1867, c. 169, 14 Stat. 471, 480, had provided that income arising after January 1, 1870, was to be free from tax. The Act of August 27, 1894, c. 349, 28 Stat. 509, 553, applied to incomes in the calendar year ending December 31, 1894. The Act of October 3, 1913, c. 16, 38 Stat. 114, 166, applied to incomes received subsequent to March 1, 1913. The Act of September 8, 1916, c. 463, 39 Stat. 756, applied to all income of that year. The increased rates established by the Act of October 3, 1917, c. 63, 40 Stat. 300, applied to incomes received during the calendar year commencing January 1, 1917. The Revenue Act of 1918, February 24, 1919, c. 18, 40 Stat. 1057, 1058, applied to incomes for the year 1918. Later Revenue Acts have been similarly retroactive with respect to the income tax: Act of November 23, 1921, c. 136, 42 Stat. 227; Act of June 2, 1924, c. 234, 43 Stat. 253, 254; Act of February 26, 1926, c. 27, 44 Stat. 9, 10.

U. S. 107. The Acts of March 3, 1917, c. 159, 39 Stat. 1000, and of October 3, 1917, c. 63, 40 Stat. 300, 302, imposing excess profits taxes on the profits earned during the calendar year, were so applied in *LaBelle Iron Works* v. *United States,* 256 U. S. 377, in *Greenport Basin & Construction Co.* v. *United States,* 260 U. S. 512, and in other cases. The validity of the Act of February 24, 1919, c. 18, Title III, 40 Stat. 1057, 1088, taxing excess profits earned during the calendar year 1918, has never been questioned. Compare *Willcuts* v. *Milton Dairy Co.,* 275 U. S. 215; *Blair* v. *Oesterlein Machinery Co.,* 275 U. S. 220; *Porto Rico Coal Co.* v. *Edwards,* 275 Fed. 104; *National Paper & Type Co.* v. *Edwards,* 292 Fed. 633. The Munition Manufacturer's Tax, imposed by the Act of September 8, 1916, c. 463, Title III, 39 Stat. 756, 780, applied to the twelve months ending December 31, 1916. Compare *Carbon Steel Co.* v. *Lewellyn,* 251 U. S. 501; *United States* v. *Anderson,* 269 U. S. 422, 435. The Act of February 24, 1919, c. 18, 40 Stat. 1057, 1126, which materially increased the capital stock tax, made the increase retroactive to July 1, 1918. In *Hecht* v. *Malley,* 265 U. S. 144, 164, these retroactive provisions were held to validate taxes erroneously assessed under an earlier act and paid before the passage of the Act of 1919.

Except for the peculiar tax involved in *Nichols* v. *Coolidge,* 274 U. S. 531, no federal revenue measure has ever been held invalid on the score of retroactivity. The need of the Government for revenue has hitherto been deemed a sufficient justification for making a tax measure retroactive whenever the imposition seemed consonant with justice and the conditions were not such as would ordinarily involve hardship. On this broad ground rest the cases in which a special assessment upon real estate has been upheld although the benefit resulting from the improvement had been enjoyed and the cost thereof had been paid prior to any legislation attempting to authorize

the assessment, *Wagner* v. *Baltimore,* 239 U. S. 207; also the cases in which special assessments upon real estate have been upheld although the benefit had been conferred and the cost thereof had been paid before there was a valid authorization either of the improvement or of the assessment. Compare *Charlotte Harbor & Northern Ry. Co.* v. *Welles,* 260 U. S. 8. Such retroactive legislation has been sustained, although the validating statute was not enacted until after the property benefited had passed to a bona fide purchaser without notice of any claim that it had been, or might be, assessed for a benefit. *Seattle* v. *Kelleher,* 195 U. S. 351. Compare *Citizens National Bank* v. *Kentucky,* 217 U. S. 443, 454. The right of the Philippine Government to retain import and export duties laid and collected without authority, was sustained where thereafter Congress by retroactive legislation confirmed the unlawful action in collecting the duties. *United States* v. *Heinszen & Co.,* 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226. Liability for taxes under retroactive legislation has been "one of the notorious incidents of social life." *Seattle* v. *Kelleher,* 195 U. S. 351, 360. Recently this Court recognized broadly that "a tax may be imposed in respect of past benefits." *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, 339.

The Act with which we are here concerned had, however, a special justification for retroactive features. The gift tax was imposed largely to prevent evasion of the estate tax by gifts inter vivos, and evasion of the income tax by the splitting up of fortunes and the consequent diminution of surtaxes. If, as is thought by the Court, Congress intended the gift tax to apply to all gifts during the calendar year, its purpose may well have been to prevent evasion of the gift tax itself, by the making of gifts after its introduction and prior to its passage. Is Congress powerless to prevent such evasion by the vigilant

and ingenious? This Court has often recognized that a measure may be valid as a necessary adjunct to a matter that lies within legislative power, even though, standing alone, its constitutionality might have been subject to doubt. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Ruppert* v. *Caffey,* 251 U. S. 264, 289; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560. If the legislature may prohibit the sale of confessedly innocent articles in order to insure the effective prohibition of others, I see no reason why it may not spread a tax over a period in advance of its enactment sufficiently long to insure that the tax will not be evaded by anticipating the passage of the act. Compare *United States* v. *Doremus,* 249 U. S. 86, 94. In taxation, as well as in other matters, "the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured." See Mr. Justice Holmes, in *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 241. Under the rule now applied, even a measure framed to prevent evasion of a tax from a date when it is practically certain that the act will become law, is deemed unreasonable and arbitrary.

The problem of preventing loss of revenue by transactions intervening between the date when legislation is introduced and its final enactment, is not a new one; nor is it one peculiar to the gift tax. Other nations have met it by a method similar to that which the Court holds to be denied to Congress. England long ago adopted the practice of making customs and excise duties retroactive to the beginning of the fiscal year or to the date when the government's resolutions were agreed to by the House of Commons sitting as a Committee of Ways and Means.[2]

[2] The practice applies not only to tariff and excise measures, but to all kinds of impositions. For examples of the practice, compare: (a) as to tariffs and excises, Acts of May 25, 1855, 18 & 19 Vict., cc. 21, 22, retr ctive to dates in April, 1855; Act of July 31, 1894, 57 & 58 Vict., c. 30, §§ 26–29, retroactive to April 17, 1894; Act of April

A similar practice prevails in Ireland,[3] in all the self-governing Dominions,[4] and to some extent in France and Italy.[5] In the United States, retroactive operation of the tariff has been repeatedly recommended by the Tariff Commission and by the Secretary of Commerce.[6] Legislation to that end was reported by the Committee on Ways and Means of the House of Representatives.[7] No suggestion seems to have been made that such legislation would by its retroactive feature violate the due process clause.[8]

29, 1910, 10 Edw. 7, c. 8, §§ 81, 82, 84, retroactive to April 30, 1909; Act of December 23, 1915, 5 & 6 Geo. 5, c. 89, §§ 1–12, retroactive to dates in September, 1915; Act of July 29, 1927, 17 & 18 Geo. 5, c. 10, retroactive to April 12, 1927; (b) as to income tax, Act of June 22, 1842, 5 & 6 Vict., c. 35, retroactive to April 5, 1842; Acts of May 12 and June 16, 1854, 17 & 18 Vict., cc. 10, 24, retroactive to April 6, 1854; Act of May 25, 1855, 18 & 19 Vict., c. 20, retroactive to April 5, 1855; Act of July 31, 1894, 57 & 58 Vict., c. 30, § 33, retroactive to April 6, 1894; Act of April 29, 1910, 10 Edw. 7, c. 8, §§ 65–66, retroactive to April 6, 1909; Act of July 29, 1915, 5 & 6 Geo. 5, c. 62, § 10, retroactive to April 6, 1915; Act of December 23, 1915, 5 & 6 Geo. 5, c. 89, § 20, raising by 40% the rates for the last six months of the current income tax year; (c) as to inheritance tax, Act of April 29, 1910, 10 Edw. 7, c. 8, § 54, retroactive to April 30, 1909. The proposed taxes are provisionally collected from the date of the resolution of the House of Commons. As to customs and excises this is said to have rested on ancient usage. Highmore, The Customs Laws, 3d ed., 61; May, Parliamentary Practice, 11th ed., 589. In *Bowles* v. *Bank of England,* [1913] 1 Ch. 57, it was held that until the passage of the Finance Act a tax-payer was under no legal obligation to pay the sum provisionally assessed as income tax by the Treasury. By the Provisional Collection of Taxes Act, 3 Geo. 5, c. 3, a resolution of the Committee on Ways and Means of the House of Commons relative to the imposition of any tax and declaring it to be in the public interest that the resolution should have statutory effect, is given the same force as an act of Parliament, provisional on the final enactment of the tax.

[3] See, *e. g.,* Act of May 21, 1927, retroactive to April 22, 1927.

[4] See (a) as to Canada, Act of July 19, 1924, retroactive to April 11, 1924; (b) as to Newfoundland, Act of June 9, 1926, retroactive to

For nearly a century after the adoption of the Constitution, this Court approached with great reluctance the exercise of its high prerogative of declaring invalid an act of Congress. In *Ogden* v. *Saunders,* 12 Wheat. 213, 270, it said with respect to a state statute: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt." In the *Sinking Fund Cases,* 99 U. S. 700, 718, this Court

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May 19, 1926; (c) as to Australia, amendment to the tariff effective provisionally on November 25, 1927, and not yet finally approved; (d) as to New Zealand, Act of October 25, 1927, giving the force of law to all resolutions purporting to impose customs duties passed by the House of Representatives on or after September 13, 1927; (e) as to the Union of South Africa, motion of the Minister of Finance, April 5, 1926, "that, subject to an Act to be passed during the present session of Parliament, and to such rebates or remissions of duty as may be provided for therein, the customs duties on the articles as set forth in the accompanying Schedule be increased to the extent shown therein." This motion was embodied in Act No. 34, published in the Union Gazette Extraordinary of June 9, 1926.

[5] See Journal Officiel, December 31, 1926, p. 13,749; Interim Legislation, a Report by the Tariff Commission, pp. 34–36.

[6] See Interim Legislation, a Report submitted by the Tariff Commission to the Chairman of the Committee on Ways and Means of the House of Representatives, April 16, 1917. The recommendation has been repeated in the Annual Reports of the Commission: First Annual Report, 1917, p. 5; Third Annual Report, 1919, p. 7; Fourth Annual Report, 1920, p. 6; Sixth Annual Report, 1922, p. 8. The Secretary of Commerce made a similar recommendation in a letter of May 10, 1921, to the Chairman of the Ways and Means Committee. House Report, 67th Cong., 1st Sess., No. 86, p. 5.

[7] H. J. Res., 67th Cong., 1st Sess., No. 124, 61 Cong. Rec. 1590, 1592, 1618; House Report, 67th Cong., 1st Sess., No. 86.

[8] On May 31, 1921, a member of the Ways and Means Committee filed a minority statement in which he objected to the proposed legislation on the ground that it amounted to a delegation of legislative power to a committee of the House of Representatives. 61 Cong. Rec. 1927.

said with respect to an act of Congress: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." The presumption in favor of the validity of an act of Congress, often adverted to, has been acted upon as recently as *The Assigned Car Cases*, 274 U. S. 564; and *Hampton, Jr., & Co.* v. *United States, ante*, p. 394. The presumption should be particularly strong where, as here, the objection to an act arises not from a specific limitation or prohibition on Congressional power but only out of the "vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law," MR. JUSTICE HOLMES, in *Adkins* v. *Children's Hospital*, 261 U. S. 525, 568. I find no reason for thinking that the presumption has been overcome.

WILSON ET AL. *v.* PACIFIC MAIL STEAMSHIP COMPANY ET AL.

PACIFIC MAIL STEAMSHIP COMPANY ET AL. *v.* WILSON ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 146 and 173. Argued January 6, 1928.—Decided April 9, 1928.

In fine, clear weather, on a smooth, open sea, the Newport, an iron passenger steamer, proceeding eastward at nine knots, rammed the port side of the Svea, a wooden steam schooner, steaming northward at eight knots. They had been approaching each other in full view for more than half an hour. Twenty minutes before the collision, the master of the Newport quitted the bridge, leaving an

inexperienced officer in charge; and, at the trial, he failed to explain this conduct or to show what, if any, directions he gave or precautions he took to insure proper navigation. Each vessel held her course and speed up to the moment of the collision. The Svea had tried, in vain, by repeated blasts of her whistle, to ascertain the Newport's intention. The Newport could have averted the collision by porting her helm or reversing her engines two minutes before it occurred, and there was nothing to inform the Svea that this would not be done until too late for her master to maneuver into safety. *Held:*

1. That the master of the Newport was presumptively negligent and, in the absence of clear exonerating evidence, was personally liable. P. 460.

2. The Svea was not at fault in maintaining her course and speed, pursuant to the fundamental rule of the International Rules for Navigation at Sea. Her master could not possibly know the result of departing from it, and, on the facts, could not be held indiscreet in following it. P. 460.

15 F. (2d) 342, (C. C. A.,) reversed in part, affirmed in part.
District Court (Am. Mar. Cas. 1924, 1285,) affirmed.

CERTIORARI, 273 U. S. 686, 690, to a decree of the Circuit Court of Appeals which reversed one by the District Court in libel proceedings growing out of a collision at sea. The District Court held the Newport and her master liable and exonerated the Svea. The Circuit Court of Appeals held both ships at fault and the master of the Newport also liable.

Mr. Louis T. Hengstler, with whom *Mr. Frederick W. Dorr* was on the brief, for petitioners in No. 146 and respondents in No. 173.

Both vessels have distinct legal obligations; neither the one nor the other is privileged in any proper sense. That this view is the correct one appears from the language of the rule itself: "shall keep her course and speed." This is as imperative a duty as the duty of the other vessel, that it "shall keep out of the way." *The Delaware,* 161 U. S. 459; *The Orduna,* 14 Asp. 574; *The Haida,* 191 Fed. 623.

Any distinct indication that the *Newport* was about to fail in her duty to avoid the *Svea* being absent, the *Svea* was not in fault under the *Delaware case* for maintaining her course and speed until the vessels were *in extremis*.

Under the settled law, the *Newport*, being admittedly at fault, assumed the burden of showing beyond any doubt that some fault of the *Svea* contributed to the collision. *The City of New York*, 147 U. S. 72; *The Victory & The Plymothian*, 168 U. S. 410.

The record fails to show that the master was free from negligence. It contains affirmative evidence of his negligence. It fails to identify the admitted fault of the ship with any negligence of the subordinate.

The courts below have made no finding that the evidence absolves the master from personal negligence.

Cross-petitioners' petition having been presented on a moot question, the writ of certiorari was improvidently granted, and should be dismissed. *Furness Co.* v. *Insurance Ass'n*, 242 U. S. 430; *Southern Power Co.* v. *Public Service Co.*, 263 U. S. 508.

The master of a ship is legally liable for the negligence of a subordinate to whom he delegates the function of navigating the ship on the high seas. The reason for the rule is stronger under modern conditions.

Mr. Farnham P. Griffiths, with whom *Messrs. Edward J. McCutchen* and *Warren Olney, Jr.*, were on the brief, for respondents in No. 146 and cross-petitioners in No. 173.

The rule requiring the privileged vessel on crossing courses to hold course and speed (Article 21) is not unqualified, but is subject to the provisions of the note to Article 21, the general prudential rule (Article 27) and the rule of good seamanship (Article 29), under which, in special circumstances, the privileged vessel must depart from her primary duty in order to avoid immediate danger of collision.

These rules, by their very terms, qualify all the other rules, thus recognizing and enforcing the doctrine of this Court that "every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters." *The Sunnyside,* 91 U. S. 208; *The New York,* 175 U. S. 187; *The America,* 92 U. S. 432.

The lower federal courts have repeatedly called attention to the qualification under special circumstances of the primary rules. *La Lorraine,* 12 F. (2d) 436; *The Admiral Watson,* 266 Fed. 122; *The George S. Tice,* 287 Fed. 127; *The Senator Rice,* 223 Fed. 524; *The Devonian,* 110 Fed. 588; *The Southern,* 224 Fed. 210; *The Jason,* 288 Fed. 57; *The Non Pareille,* 33 Fed. 524; *The Aurania and The Republic,* 29 Fed. 98.

A case of special circumstances arises and the privileged vessel must depart from her primary duty and take affirmative action to avert collision if she receive distinct indication that the giving way vessel is about to fail in her duty. *The Delaware,* 161 U. S. 459; *The New York,* 175 U. S. 182; *The Sunnyside,* 91 U. S. 208.

In a collision, occurring as this did, on the open ocean with perfect visibility and nothing to obstruct navigation, there is a presumption of mutual fault, and the vessel (*Svea*) seeking to be excused, must exonerate herself by the clearest evidence. *The City of New York,* 147 U. S. 72; *The Victory and The Plymothian,* 168 U. S. 410; *The Binghamton,* 271 Fed. 69; *The Tasmania,* 6 Asp. 517.

The courts have repeatedly stated that collisions of this character seem impossible without the concurring negligence of both sets of navigators; that it is hardly possible that the stupidity or obstinacy of a single master can produce them; and that both vessels will be deemed *prima facie* negligent and neither exonerated unless "upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable

blame." *The Tenadores,* 298 Fed. 740; *The Senator Rice,* 223 Fed. 524; *The Coamo,* 280 Fed. 282; *Insurance Ass'n* v. *Furness Co.,* 215 Fed. 859; *The Comus,* 19 F. (2d) 774; *The West Hartland,* 2 F. (2d) 834; *The Tasmania, supra.* See also David Wright Smith, in The Law Relating to the Rules of the Road at Sea.

Apart from presumption, the *Svea* received distinct indication that the *Newport* was not going to give way. The combination of an apparently deserted bridge, three successively unacknowledged whistle signals, two of them danger blasts, and an unchanging course of a vessel whose unquestionable duty it was to give way, seem to us as powerful a grouping of indications that the burdened vessel was failing in her duty as one could put together. *The Senator Rice,* 223 Fed. 524; *The Tenadores,* 298 Fed. 740; *The New York,* 175 U. S. 187; *The Sunnyside,* 91 U. S. 208; *Nautik* v. *Oostvoorne,* 6 Lloyds List 110; *The Coamo,* 280 Fed. 282; *The Jason,* 288 Fed. 57; *The George S. Tice,* 287 Fed. 127; *The Devonian,* 110 Fed. 588.

Having received distinct indication, the *Svea* was at fault for not acting. *City of Corinth* v. *Tasmania,* 15 A. C. 223; *The Zampa,* 113 Fed. 541; *The Charles A. Campbell,* 142 Fed. 996; *The Queen Elizabeth,* 122 Fed. 406; *The Shawmut,* 261 Fed. 616; *The Montauk,* 180 Fed. 697.

The time for action by the *Svea* was when there was room for her to act effectively so as to avert the threatened collision by her action alone. *The Delaware,* 161 U. S. 459; *The Lepanto,* 21 Fed. 651; *The Aurania,* 29 Fed. 98; *The Normandie,* 43 Fed. 151.

The ruling that the master of a vessel, although not personally negligent, is legally liable for the torts of his subordinates, is in conflict with the established doctrine of *respondeat superior. Stone* v. *Cartwright,* 6 Term. Rep. (Durn & East 411); *Brown & Sons Lumber Co.* v.

Sessler, 128 Tenn. 665; American Annotated Cases, 1915, c. 103; Mechem's Agency, 2d Ed. § 1643.

The authorities relative to the liability of a shipmaster for the torts of subordinates are in conflict. Those holding him liable, although free from personal fault, are based either upon fallacious reasoning or upon a misconception of previous authorities.

Even if there once were a possible basis for holding a shipmaster liable for the negligent acts of his subordinates, the reason for such harsh doctrine has ceased to exist and the rule should no longer be applied.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Twelve miles off the shore of California, 9:53 A. M., November 29, 1922, sky clear, sea smooth and uninterrupted, the *Newport,* an iron passenger steamer 337 feet long—2,643 tons—drove her prow amidships into the port side of the *Svea,* a wooden lumber steam schooner of 618 tons and 170 feet long. Both vessels were seriously injured. The owner of the *Svea* libeled the *Newport,* her owners and master in the District Court, Southern District of California. They charged that the collision resulted from the sole fault of the *Newport* and her navigators and asked for full damages. A cross libel admitted fault, but claimed that the other vessel contributed, and prayed for application of the half-damage rule.

The trial court concluded that the collision resulted solely from the gross negligence and plain fault of the *Newport,* and granted a decree against her and the master—McKinnon—for all established damages. The Circuit Court of Appeals held there was mutual fault, divided the damages, and definitely declared that under the approved rule the master was responsible for the negli-

gence of subordinates without regard to his personal fault.

Counsel for cross-petitioner McKinnon earnestly maintain that, considering present conditions of navigation, the master, when free from fault, ought not to be held liable for the action of others. But it is unnecessary now to discuss that question.

Here the record fails to disclose that the master met the exacting duties voluntarily assumed. An amazing casualty occurred while he commanded and presumably, at least, he participated in the admitted fault of his ship. Certainly, nothing short of very clear evidence of intelligent care could possibly absolve him.

The day was fine; the horizon ten miles away. The *Newport* was proceeding eastward at nine knots with the *Svea* off her starboard side steaming northward at eight knots. They were approaching each other upon crossing courses and in full view for more than half an hour. Twenty minutes before the collision Captain McKinnon quit the bridge of the *Newport,* leaving the third officer in charge. Of this subordinate he testified: "This young man was just keeping his first watch on ship; he just shipped the day before, and was making his first voyage." When upon the witness stand, the Captain failed to show what, if any, directions he gave, or that he took reasonable precaution to insure proper navigation in circumstances of obvious danger. He gave no excuse, nor did he indicate any necessity for leaving the bridge. It is impossible for us to say that he acted prudently.

The International Rules for Navigation at Sea (Act 1890, ch. 802, 26 Stat. 327, Act 1894, ch. 83, 28 Stat. 82; U. S. C., Title 33, §§ 104, 106, 112, 121, p. 1055) direct—

"Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on

her own starboard side shall keep out of the way of the other.

"Art. 21. Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.

"Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-away vessel alone, she also shall take such action as will best aid to avert collision.

"Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

"Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

The *Newport* kept her course and speed up to the moment of collision and it is admitted that in so doing she was at fault. But her counsel claim that the *Svea* also was at fault in holding her course and speed and that by acting differently she should have avoided the accident. The evidence does not support that view. Consideration must be given to the circumstances as they appeared at the time; not as they are now known. The *Svea* adhered to the fundamental rule. If in the difficult circumstances forced upon him her navigator, whose qualifications are not questioned, exercised his best judgment in not departing therefrom, the burdened vessel must accept the consequences. Having driven him into a perplexing

situation, the *Newport* cannot complain because he failed to make the most judicious choice between the hazards presented.

Without stopping to set out the evidence, it is enough to say that we think there is no clear proof that the *Svea* failed in her duty. She tried in vain by repeated blasts to ascertain the *Newport's* intention. Her master could not possibly know the result of departing from the prescribed rule, and we cannot say that he acted indiscreetly in following it.

Big vessels may not insolently disregard smaller ones; super size gives no right to domineer. The *Newport* was a handy vessel. By porting her helm or reversing her engines two minutes or less before the collision occurred she could have avoided it easily. There was nothing to show that she would not do one of these things until too late for the *Svea's* master to maneuver his vessel into safety.

The applicable doctrine is plainly announced in *The Delaware,* 161 U. S. 459, 469—

"The cases of *The Britannia,* 153 U. S. 130, and *The Northfield,* 154 U. S. 629, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some *distinct indication* that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way; the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of

action on the part of both, which would bring about more collisions than it would prevent. *Belden* v. *Chase,* 150 U. S. 674; *The Highgate,* 62 L. T. R. 841; S. C. 6 Asp. Mar. Law Cases, 512."

The decree of the Circuit Court of Appeals in 146 is reversed and that of the District Court is affirmed. In 173 the decree of the Circuit Court of Appeals is affirmed.

No. 146, reversed.
No. 173, affirmed.

UNITED STATES *v.* MANZI.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 204. Argued February 23, 1928.—Decided April 9, 1928.

1. The widow of an alien who died after declaring his intention to become a citizen but before completing his naturalization, must, in order to obtain the statutory benefit of his declaration, file her petition for naturalization not less than two nor more than seven years after the date of her deceased husband's declaration of intention. P. 464.
2. Doubts concerning a grant of citizenship must be resolved against the claimant. P. 467.

16 F. (2d) 884, reversed.

CERTIORARI, 274 U. S. 730, to a judgment of the Circuit Court of Appeals, which affirmed a judgment dismissing the petition of the United States for the cancellation of a certificate of naturalization.

Solicitor General Mitchell, with whom *Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely,* Attorney in the Department of Justice, were on the brief, for the United States.

No appearance for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Aniello Manzi filed his declaration of intention to become a citizen of the United States October 15, 1913. He died December 19, 1914. On October 4, 1924, his widow Amalia, respondent herein, relying upon her husband's declaration, asked for citizenship. This was granted February 3, 1925, and certificate issued over the objection that her request came too late, more than seven years having passed since the husband made his declaration.

January 9, 1926, the United States began this proceeding by a petition in the District Court for Rhode Island to cancel her certificate upon the ground that it had been illegally procured. That court dismissed the petition and the Circuit Court of Appeals affirmed the decree. The single question for our consideration is one of law: Whether it was unnecessary for respondent to declare her intention because her husband had declared his in 1913.

The Solicitor General maintains, and we think rightly, that while a widow may have the benefit of her husband's declaration, she must perfect her citizenship under the restrictions specified for him, including the requirement that request for naturalization must come not more than seven years after such declaration. The intention of Congress was to treat the action of the husband as though taken by the widow herself.

The Act of June 29, 1906, "To establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States" (34 Stat. 596), definitely prescribes the circumstances under which aliens may be naturalized. Its requirements are much more stringent than those found in former acts.

Section 4, (Par. 1) directs that two years, at least, prior to his admission, and after he has reached the age of eighteen years, the alien shall declare on oath that it is his bona fide intention to become a citizen, and then directs—

"Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of the filing of his petition; and if he has children, the name, date and place of birth and place of residence of each child living at the time of the filing of his petition: *Provided,* That if he has filed his declaration before the passage of this Act he shall not be required to sign the petition in his own handwriting."

"Sixth. When any alien who had declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this Act, be naturalized without making any declaration of intention."

"Sec. 27. That substantially the following forms shall be used in the procedings to which they relate:

Declaration of Intention
(Invalid for all purposes seven years after the date hereof.)"

The formula to be observed by a declarant is then set forth.

Pertinent sections of the Revised Statutes, in effect prior to 1906, provided—

"Sec. 2165. An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:

"First. He shall declare on oath, before a circuit or district court of the United States, or a district or supreme court of the Territories, or a court of record of any of the States having common-law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject."

"Sec. 2168. When any alien, who has complied with the first condition specified in section twenty-one hundred and sixty-five, dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law."

Manifestly, the Act of 1906, demands much more of the widow of a deceased alien who had declared his intention before she can become a citizen than was necessary under § 2168, Revised Statutes. Although in certain circumstances she may obtain naturalization without her personal declaration of intention, she must comply with all other prerequisites.

Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant. *Swan & Finch Co.* v. *United States,* 190 U. S. 143, 146. If Aniello had lived, his declaration of intention would have been valueless to him after seven years. The construction now suggested by respondent would prolong the efficacy of this application for her benefit during an indefinite period.

The Act of 1906 definitely directs that the petition for citizenship shall be filed within seven years after the declaration, and we find nothing in the words used or the legislative purpose which permits an extension of such time for the benefit of widows. *United States* v. *Poslusny,* 179 Fed. 836; *In re Schmidt,* 161 Fed. 231, and *In re Shearer,* 158 Fed. 839, we think give no substantial support to the contrary view.

The decree of the court below is *Reversed.*

MR. JUSTICE SUTHERLAND and MR. JUSTICE SANFORD dissent.

ALASKA PACKERS ASSOCIATION *v.* INDUSTRIAL ACCIDENT COMMISSION ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 266. Argued March 2, 1928.—Decided April 9, 1928.

A person employed by a fishing and canning company as a seaman, fisherman and for general work in and about a cannery, was injured, after the fishing season was over, while standing upon the shore and endeavoring to push a stranded fishing boat into navigable water for the purpose of floating it to a nearby dock, where it was to be lifted out and stored for the winter. *Held* that the injury, if within the admiralty jurisdiction, was of such a local character as to be cognizable under a state compensation law. P. 469.

73 Calif. Dec. 330, affirmed.

CERTIORARI, 275 U. S. 512, to a judgment of the Supreme Court of California, affirming an award of the State Industrial Accident Commission.

Mr. Blair S. Shuman, with whom *Mr. Allen L. Chickering* was on the brief, for petitioner.

Mr. G. C. Faulkner for respondent Accident Commission.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

While standing on the land in Alaska, respondent Peterson endeavored to push into navigable water a stranded boat, 26 feet long, theretofore used by him and another for taking fish, and, while so engaged sustained bodily injuries. The fishing season had ended, the nets had been removed, and the boat, partly in the water, was resting on the sand. The immediate purpose was to float it to the dock nearby in order that it might be lifted thereon and stored for the winter, according to the ordinary practice.

Petitioner is a California corporation engaged in the business of taking fish in Alaska and canning them at its factory located in that Territory. Peterson resided in California. Within that State he entered into a contract with the Association whereby he agreed to go to Alaska as a seaman on its bark "Star of Iceland" and, after arriving at the cannery, to go ashore and act there as directed—"anything I was told to do." Among other things, he made nets, fixed up the small boats always kept there, took them out, and served as a fisherman on one of them.

The Industrial Accident Commission of California, purporting to act under the laws of that State, made an award against the petitioner and in favor of Peterson, and this was affirmed by the Supreme Court. The judgment is

challenged here upon the sole ground that when injured he was doing maritime work under a maritime contract and that the rights and liabilities of the parties must be determined by applying the general rules of maritime law, and not otherwise. *Union Fish Co.* v. *Erickson,* 248 U. S. 308, *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and similar cases, are relied upon.

Whether in any possible view the circumstances disclose a cause within the admiralty jurisdiction, we need not stop to determine. Even if an affirmative answer be assumed, the petitioner must fail. Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character. The doctrine announced in *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, and *Millers' Ind. Underwriters* v. *Braud,* 270 U. S. 59, 64, is incompatible with the petitioner's claim.

The judgment of the court below must be affirmed.

Affirmed.

LAMBORN ET AL. *v.* THE NATIONAL BANK OF COMMERCE OF NORFOLK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 163. Argued January 12, 1928.—Decided April 9, 1928.

On behalf of a client who had agreed to buy and pay for Java sugar upon delivery f. o. b. cars at Philadelphia, a bank issued a letter of credit to meet the sellers' drafts, which provided, among other conditions, that shipment be made by steamer or steamers from

Java to Philadelphia. *Held* that the condition was complied with where the consignment came from Java to Philadelphia by a steamer originally destined from Java "to Port Said, option New York," but which was diverted while on the high seas, so that she pursued the same route to Philadelphia as if she had been destined to that port from the beginning of the voyage. P. 471.
15 F. (2d) 473, reversed.

CERTIORARI, 273 U. S. 688, to a judgment of the Circuit Court of Appeals, affirming a judgment for the respondent bank in an action by the petitioners to recover damages for the bank's refusal to honor a sight draft drawn against a letter of credit. See also 2 F. (2d) 23.

Mr. Louis O. Van Doren, with whom *Messrs. Edward R. Baird, Jr., H. G. Connor, Jr.,* and *Edward S. Bentley* were on the brief, for petitioners.

Mr. Tazewell Taylor for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This action was brought in the federal court for eastern Virginia by Lamborn & Company, of New York City, against The National Bank of Commerce of Norfolk. The jurisdiction of the District Court rested upon diversity of citizenship. The plaintiffs sought damages for the refusal to honor a sight draft drawn against a letter of credit, given pursuant to a contract of T. S. Southgate & Company to buy 1,000 bags of Java white sugar at 22 cents per pound less 2%, duty paid, f. o. b. Philadelphia, landed weights. Payment was to be made in New York City upon presentation of sight draft with invoice and railroad order notify bill of lading attached. The letter of credit provided: "Shipment to be made during August/September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

The sugar tendered had been shipped on the West Cheswald, a steamer which sailed from Java on September 30,

and by a continuous voyage arrived in Philadelphia on December 16. Then followed promptly the discharge of 1,000 bags of sugar; the ascertainment of the net landed weight; the payment of the duty; the shipment free on board railroad cars at Philadelphia of the specified quantity of sugar to T. S. Southgate & Company; the drawing against the letter of credit of a sight draft for the purchase price, $48,009.81; its presentation, together with the appropriate shipping documents, for payment; and the refusal to honor. All this was done long before the expiration of the letter of credit. Between April 23, 1920, the date of the contract, and the tender of the sugar, the market price had fallen 11 cents.

The Bank claimed that the sugar tendered failed to satisfy the requirements of the contract, because it had come, not on a steamer which had been continuously destined from Java to Philadelphia, but upon one which, originally destined from Java "to Port Said, option New York," was diverted by the charterers to Philadelphia, while on the high seas. The West Cheswald had sailed by a direct route from Java to Philadelphia, the diversion having been made while she was near Bermuda, about three days from port, so that she could pursue the same route to Philadelphia as if she had at all times been destined for that port. In fact, another steamship bearing sugar shipped by plaintiffs—the Washington Maru—which sailed from Java two days earlier and had at all times been destined to Philadelphia, arrived there three days after the West Cheswald. The case was tried twice before a jury. The only question in serious controversy was one of construction—the meaning to be given to the clause in the letter of credit quoted above. At the first trial both parties requested a directed verdict. The verdict was directed for the plaintiffs. The Court of Appeals reversed the judgment entered thereon and ordered a new trial. 2 F. (2d) 23. At the second trial, the presiding

judge, applying the rule declared by the appellate court, directed a verdict for the defendant. The judgment entered thereon was affirmed by the Court of Appeals, 15 F. (2d) 473. This Court granted a writ of certiorari, 273 U. S. 688, because of conflict with cases decided by the Circuit Court of Appeals for the Second Circuit, *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn* (and other cases), 276 Fed. 325, 10 F. (2d) 697, certiorari denied, 271 U. S. 683, 685, 686.

The defendant is obviously not liable unless there was a tender of sugar which met with the requirements of the letter of credit as to amount and quality of the sugar, as to the time, *Norrington* v. *Wright,* 115 U. S. 188, and the place, *Filley* v. *Pope,* 115 U. S. 213, of shipment; and as to the manner of shipment and the ultimate destination.[1] The clause "shipment by Steamer or Steamers to Philadelphia" states the manner of shipment and the ultimate destination. Compliance with its provisions was confessedly a condition of liability. The Bank contends that there was not a compliance because the sugar tendered did not come by a steamer which at all times since leaving Java was destined to Philadelphia.

We find nothing either in the words of the letter of credit, in the custom of the trade, or in reason, which justifies implying the condition that, from the inception of the voyage, Philadelphia must have been the destination intended. The transaction is not like the ordinary contract for goods to be shipped. It is not like the common c. i. f. contract for shipment from a foreign to an American port, where delivery to the ship at the port

[1] Compare *Bowes* v. *Shand,* 2 App. Cas. 455; *Ashmore & Son* v. *Cox & Co.,* [1899] 1 Q. B. 436; *Landauer & Co.* v. *Craven & Speeding Bros.,* [1912] 2 K. B. 94; *Hansson* v. *Hamel & Horley, Ltd.,* [1922] 2 A. C. 36; *Merchants Bank* v. *Griswold,* 72 N. Y. 472; *Bank of Montreal* v. *Recknagel,* 109 N. Y. 482; *Mora y Ledon* v. *Havemeyer,* 121 N. Y. 179; *Iasigi* v. *Rosenstein,* 141 N. Y. 414.

of lading is delivery to the purchaser. Nor is it like those contracts where shipment is to be made by a named vessel. Here, the contract was for a sale f. o. b. cars Philadelphia—and the buyer was not to acquire any interest in the sugar, legal or equitable, until so delivered. Thus, the contract resembles that involved in *Filley* v. *Pope,* 115 U. S. 213, upon which the Bank relies. But the question for decision here is an entirely different one. There the contract of sale provided for a "shipment from Glasgow." The meaning of the words used was clear; the question was as to their legal effect. Was shipment from Glasgow a condition? This Court held that it was. Here it is admitted that the term "shipment from Java by Steamer or Steamers to Philadelphia" is a condition. The only question is whether that phrase means not merely that the sugar must be shipped by steamer from Java to Philadelphia, but also that the steamer which carried it must, from the inception of the voyage from Java, have been continuously destined to Philadelphia. No such requirement is stated in the contract. While the original letter of credit had required the seller to furnish a copy of the "Ocean Bill of lading covering shipment Java to Philadelphia," that requirement had been eliminated on the seller's representation that compliance with it would be impracticable under the form of shipment contemplated; and its inclusion in the letter must be deemed to have been inadvertent. As was said in *Harrison* v. *Fortlage,* 161 U. S. 57, 63: "The court is not at liberty, either to disregard words used by the parties, descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of."

The plaintiffs were entitled to a directed verdict. The conclusion which we have reached is in accord, not only with that reached by the Circuit Court of Appeals for the Second Circuit, but also with that of the state courts which have had occasion to construe the same provision

in other contracts of Lamborn & Company made under like circumstances.[2] As the letter of credit is complete in itself, we have no occasion to consider the terms of the contract between Lamborn & Company and T. S. Southgate & Company, or the circumstances which led to the diversion of the West Cheswald to Philadelphia, which counsel have discussed.

Reversed.

MR. JUSTICE STONE, dissenting.

I think the judgment below should be affirmed. I cannot agree that a condition in a commercial letter of credit, that drafts are to be drawn against merchandise "shipment . . . from Java by Steamer or Steamers to Philadelphia" is satisfied by a shipment "from Java to Port Said, option New York," even though the cargo ultimately reaches Philadelphia. I had supposed, as the opinion below seems to me to show, that the character of a shipment is fixed at the time it is made, and hence that language in a mercantile contract indicating that a shipment is to be made from one point to another could only mean that the point of destination is to be known and specified at the time of shipment. *Hannson* v. *Hamel & Horley, Ltd.*, [1922] 2 A. C. 36; *Landauer & Co.* v. *Craven & Speeding Brothers*, [1912] 2 K. B. 94; *Mora y Ledon* v. *Havemeyer*, 121 N. Y. 179; *Iasigi* v. *Rosenstein*, 141 N. Y. 414, 417.

But even if this were doubtful as a general proposition, there would seem to be no room for doubt in the present

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[2] *H. O. Wilbur & Sons, Inc.* v. *Lamborn*, 276 Pa. 479, 487; *Williams Ice Cream Co., Inc.* v. *Chase National Bank*, 120 N. Y. Misc. 301; 210 App. Div. 179; *J. Hungerford Smith Co.* v. *Lamborn*, 200 N. Y. Supp. 292; *Telling Belle Vernon Co.* v. *Lamborn*, N. Y. Law Journal, December 22, 1920; *Pennsylvania Milk Products Co.* v. *Lamborn* (*and other cases*), N. Y. Law Journal, January 4, 1921. See also *Central Sugar Co.* v. *Lamborn*, 200 N. Y. Supp. 499, 195 App. Div. 909; *Lamborn & Co.* v. *Log Cabin Products Co.*, 291 Fed. 435; *Lamborn* v. *Hardie Co.*, 1 F. (2d) 679.

case. Here the letter of credit specified that drafts when presented should be accompanied by "copy of ocean bill of lading covering shipment Java to Philadelphia." Obviously such a bill of lading would be impossible unless the shipment were continuously destined for Philadelphia. It is true that, for the convenience of the seller, the bank, at the buyer's direction, later waived physical presentation of a copy of the ocean bill of lading. But the record does not show that the bank had any reason to suppose that the requirement had originally been inserted in the letter of credit by mere inadvertence; so far as it was aware, there was still to be an "ocean bill of lading covering shipment Java to Philadelphia," but the seller was to be excused from presenting it. The clause "shipment . . . from Java by Steamer or Steamers to Philadelphia" was not waived and its meaning on the date of presentation of the draft remained the same as when the credit was issued. The provision in the letter of credit that "conditions embodied in this credit must be adhered to, otherwise payment will not be effected," only expresses the rule, with which we all agree, that liability upon a mercantile contract may be established only by strict compliance with its conditions. *Filley* v. *Pope,* 115 U. S. 213; *Norrington* v. *Wright,* 115 U. S. 188; *Bowes* v. *Shand,* 2 App. Cas. 455.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE SANFORD join in this dissent.

TEXAS & NEW ORLEANS RAILROAD COMPANY *v.* THE NORTHSIDE BELT RAILWAY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 231. Argued February 28, 1928.—Decided April 9, 1928.

1. A suit under paragraphs 18 to 20 of § 1 of the amended Act to Regulate Commerce, to enjoin a railroad company from prosecuting proceedings to condemn plaintiff's land and from constructing, maintaining, or operating a railroad over it, upon the ground

that the defendant has not obtained a certificate of public convenience and necessity from the Interstate Commerce Commission, is not to be held moot because judgment of condemnation has been entered and the railroad actually constructed over the land in question, where the line has not been completed or in any part operated, and could not, physically, be operated in interstate commerce until completed. P. 478.

2. Where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the status quo. P. 479.
3. The Act to Regulate Commerce, § 1, pars. 18 to 22, does not apply to the building by wholly intrastate carriers of lines to be used wholly in intrastate commerce. P. 479.
4. A State cannot require a railroad corporation to engage in interstate commerce in violation of any law of the United States. P. 481.
5. A bill seeking to enjoin the construction and operation of a railroad over the plaintiff's land, upon the ground that paragraphs 18 to 20 of § 1 of the Act to Regulate Commerce have not been complied with, may be properly dismissed, without prejudice, where the line in question is to be a short terminal railroad extending wholly within the State from a private plant to another local railroad and is to be built and operated by a local corporation organized for the purpose, and where its use in interstate commerce has not been threatened and could not occur until the line has been completed. P. 482.

16 F. (2d) 782, affirmed.

CERTIORARI, 274 U. S. 734, to a decree of the Circuit Court of Appeals which affirmed, without deciding the merits, a decree of the District Court, 8 F. (2d) 153, dismissing without prejudice a bill to restrain the above-named respondent from prosecuting condemnation proceedings and building and operating a railroad over the petitioner's land.

Mr. J. H. Tallichet, with whom *Mr. H. M. Garwood* was on the brief, for petitioner.

Messrs. W. W. Moore, J. Y. Powell, and *Nelson Phillips* were on the brief for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Under the laws of Texas, Cullinan secured a charter for the Northside Belt Railway Company with power to build and operate, as a common carrier, a terminal railway from a private plant to another local railroad. The line was to be about five miles long and wholly within that State. The Northside Company instituted proceedings in a Texas court to acquire by condemnation a right of way, for a short distance, over unused land owned by the Texas & New Orleans Railroad Company, an interstate carrier. Thereupon, the latter brought, under paragraphs 18 to 22 of § 1 of the Act to Regulate Commerce as amended by Transportation Act, 1920, c. 91, § 402, 41 Stat. 456, 477–478, this suit in the federal court for southern Texas. The prayer was to enjoin the Northside Company from continuing the condemnation proceedings and also from constructing, maintaining or operating the railroad over the plaintiff's land. This relief was sought solely on the ground that the defendant had not obtained from the Interstate Commerce Commission the certificate of public convenience and necessity prescribed in those paragraphs of the Transportation Act.

A restraining order applied for upon the filing of the bill was denied. No application was made for an interlocutory injunction. The defendant answered that it was exclusively an intrastate carrier and as such was not subject to the Interstate Commerce Act. The case was fully heard on the merits by the District Court. It appeared that, before this suit was begun, judgment had been entered in the condemnation proceedings; that the amount of the compensation awarded had been paid into court (as provided by the law of the State); and that the Northside Company had entered into possession of the

premises taken. It appears that, before process was served upon the defendant, the line had been constructed over the strip of land in question. And it also appeared that, at the time of the hearing, the line had not yet been completed; that the defendant had not engaged or offered to engage in interstate commerce; and that it could not possibly engage in such commerce until the completion of its line.

The District Court found and held that the Northside Company was an intrastate carrier only; that its construction would not burden interstate commerce directly or indirectly; and that paragraphs 18 to 22 were not applicable to the construction of an intrastate railroad not yet engaging in interstate commerce. On that ground, the trial court denied the injunction and ordered the bill dismissed without prejudice to the right of the plaintiff "to hereafter apply for an injunction against the respondent if its activities in the future shall bring it properly within the purview" of those paragraphs. 8 F. (2d) 153.

The Circuit Court of Appeals affirmed the decree of the District Court, without passing upon the merits of the case. It held that the cause had become moot, because "the only relief prayed for was action by the court restraining the doing of things which have been done since the suit was brought." This conclusion was based on its own finding that "before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit, and appellee had constructed its railroad over said land and was operating the same." 16 F. (2d) 782. This Court granted a writ of certiorari. 274 U. S. 734.

The finding of fact upon which the Court of Appeals rested its judgment was clearly erroneous. There is no basis in the record for the finding that the railroad was in operation. The part of the railroad over the plaintiff's

land had been constructed; but the railroad had not been completed. No part of it had been operated; and apparently it was physically impossible to operate it in interstate commerce until completed. Paragraph 20 of § 402 specifically provides that unauthorized operation as well as construction may be enjoined. Moreover, the facts erroneously found would not, if true, have rendered the case moot. For where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the status quo. *Tucker* v. *Howard,* 128 Mass. 361, 363; *Town of Platteville* v. *Galena & Southern Wisconsin R. R. Co.,* 43 Wis. 493, 506–507.

The decree of the District Court was, however, properly affirmed for the reason indicated by that court. The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest. See *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *The Chicago Junction Case,* 264 U. S. 258; *Railroad Commission of California* v. *Southern Pacific Co.,* 264 U. S. 331; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry Co.,* 270 U. S. 266; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.,* 271 U. S. 244. Compare *Colorado* v. *United States,* 271 U. S. 153. The mere fact that a railroad lies wholly within one State and is to be built by an independent corporation, does not, of course, prevent the application of paragraphs 18 to 22. If it undertakes to engage in interstate commerce, its operation becomes immediately a matter of national concern and it comes within the purview of those para-

graphs.[1] But Congress did not in terms prohibit wholly intrastate carriers from building lines to be used wholly in intrastate commerce. As long as the Northside Company confines its operations to intrastate commerce, it will not violate the federal law. Compare *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204; *Railroad Commission of Texas* v. *Eastern Texas R. R. Co.*, 264 U. S. 79.

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[1] In the following cases the Interstate Commerce Commission has granted or denied certificates of convenience and necessity for the construction and operation of a new line, built by a corporation not theretofore a carrier subject to the Interstate Commerce Act, and lying wholly within the limits of one state: Application of Michigan Northern R. R. Co., 65 I. C. C. 480, 72 I. C. C. 21; Application of Coon Bayou & Arkansas City Ry. Co., 65 I. C. C. 701; Application of Uvalde & Northern Ry. Co., 67 I. C. C. 204, 554; Application of Golden Belt R. R., 67 I. C. C. 370, 70 I. C. C. 73, 71 I. C. C. 233, 99 I. C. C. 135; Application of Detroit & Ironton R. R. Co., 67 I. C. C. 600; Application of Flint Belt R. R. Co., 70 I. C. C. 292; Application of New Holland, Higginsport & Mount Vernon R. R. Co., 71 I. C. C. 119; Application of Kansas & Oklahoma Southern Ry. Co., 71 I. C. C. 130, 90 I. C. C. 349, 553; Application of Mingo Valley R. R. Co., 71 I. C. C. 139, 82 I. C. C. 797; Application of Osage Ry. Co., 71 I. C. C. 160; Application of National Line R. R. Co., 71 I. C. C. 556; Application of Shreveport & Northeastern Ry. Co., 71 I. C. C. 586; Construction of Line by Eastern Maine, 72 I. C. C. 39; Construction by Nashville & Atlantic R. R., 72 I. C. C. 655; Construction of Line by Carbon County Ry., 76 I. C. C. 485; Construction of Line by Pacific Southwestern R. R., 76 I. C. C. 488; Construction of Line by Utah Central R. R., 76 I. C. C. 737; Construction of Line by Jefferson Southwestern, 76 I. C. C. 778, 86 I. C .C. 796, 90 I. C. C. 512, 94 I. C. C. 656, 111 I. C. C. 105, 124 I. C. C. 649; Construction of Line by Longview, Portland & Northern, 79 I. C. C. 805, 90 I. C. C. 303; Construction of Line by American Niagara R. R., 82 I. C. C. 420; Construction of Line by Kansas & Missouri Ry. & Terminal Co., 82 I. C. C. 612; Construction and Operation by Arkansas Short Line, 82 I. C. C. 651; Construction of Line by Mississippian Ry., 82 I. C. C. 698; Construction of Line by Wenatchee Southern Ry. Co., 90 I. C. C. 237, 94 I. C. C. 673, 99 I. C. C. 349, 105 I. C. C. 347; Construction of Line by Rio Grande City Ry. Co., 90 I. C. C. 583,

The plaintiff admits that operation of the Northside line has not begun. But it insists that under the laws of Texas every common carrier not only may, but must, if requested, engage also in interstate business, and it argues that this makes the Northside Company subject to the Interstate Commerce Act. Texas Rev. Stat. 1925, Art. 6407. Obviously, the law of Texas could not require the

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94 I. C. C. 323, 655; Proposed Construction by Nueces Valley, Rio Grande & Gulf R. R. Co., 90 I. C. C. 616; Proposed Construction by Rio Grande City & Northern Ry., 90 I. C. C. 689; Proposed Construction and Acquisition by Morgantown & Wheeling R. R. Co., 94 I. C. C. 372; Proposed Construction of Line by Colorado, Columbus & Mexican R. R., 94 I. C. C. 676; Construction of Line by Quebec Extension Ry. Co., 99 I. C. C. 93, 189, 111 I. C. C. 621; Construction of Line by Graham County R. R. Co., 99 I. C. C. 264; Construction and Operation of Los Angeles Junction Ry., 99 I. C. C. 287, 111 I. C. C. 433, 124 I. C. C. 703; Construction of Line by National Coal Ry. Co. 99 I. C. C. 569; Construction of Line by Mississippi & Schoona Valley R. R. Co., 99 I. C. C. 606; Construction of Line by Oklahoma & Rich Mountain R. R. Co., 105 I. C. C. 559; Proposed Construction by Detroit Connecting R. R., 105 I. C. C. 657; Proposed Construction by Detroit Grand Belt R. R. Co., 105 I. C. C. 669; Construction of Line of Railroad by State of Alabama, 105 I. C. C. 673; Construction of Line by West Pittston-Exeter R. R., 111 I. C. C. 626, 117 I. C. C. 315; Construction of Line by Northern Oklahoma Rys., 111 I. C. C. 765; Construction of Line by Lowell & Southern R. R. Co., 117 I. C. C. 1; Construction of Line by Rio Grande, Micolithic & Northern Ry., 117 I. C. C. 19; Construction of Line by Southern Kansas Industrial Belt Ry. Co., 117 I. C. C. 210; Proposed Construction of Line by Perry & Southeastern Ry., 124 I. C. C. 341. In Construction of Line by Grand Prairie & Northern R. R., 76 I. C. C. 437, the Commission dismissed an application by a wholly intrastate line intending to engage exclusively in intrastate business. In Construction of Line by Jefferson Southwestern, 86 I. C. C. 796, 799, the Commission said that the fact that a proposed line of railroad was already in part constructed for use in intrastate commerce could have no bearing on its decision with regard to granting or denying a certificate. "So far as interstate commerce is concerned, the proposed line does not exist."

Northside Company to engage in interstate commerce, if by doing so it violated any law of the United States. Compare *Cleveland, Cincinnati, Chicago, & St. Louis Ry. Co.* v. *United States,* 275 U. S. 404. Here, there was as yet no threat to use the line in interstate commerce; and it was shown that the line could not possibly be so used until completed. There was clearly no imminent danger that irreparable injury would result from its mere construction. Under these circumstances, to deny the injunction and dismiss the bill without prejudice, was, at least, a permissible exercise of the court's discretion.

Affirmed.

MIDLAND VALLEY RAILROAD COMPANY *v.* BARKLEY ET AL.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 375. Argued March 9, 1928.—Decided April 9, 1928.

A railroad, in a time of coal-car shortage, distributed open-top cars to tipple mines, which can use only that type, and box cars to wagon mines. The owner of a wagon mine, shipping interstate, refused box cars and, relying on § 22 of the Interstate Commerce Act, sued the railroad in the state court for breach of its duty to furnish cars under the local law. *Held* that the action would not lie, since the question at issue was the reasonableness of the carrier's practice of car distribution, which was an administrative question for the Interstate Commerce Commission. P. 484.
172 Ark. 898, reversed.

CERTIORARI, 275 U. S. 514, to a judgment of the Supreme Court of Arkansas, which affirmed a recovery in an action against the railroad for failure to furnish coal cars.

Mr. Thomas B. Pryor, with whom *Messrs. O. E. Swan* and *Vincent M. Miles* were on the brief, for petitioner.

Mr. Charles I. Evans, with whom *Messrs. U. C. May* and *Jeptha H. Evans* were on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Barkley and Burnett operated a wagon coal mine in Arkansas located about a quarter of a mile from the line of the Midland Valley Railroad, a corporation of that State. They shipped their coal by that carrier, largely in interstate commerce. In the spring and summer of 1922 there was a widespread strike in bituminous coal mines throughout the United States. When mining was resumed in August, an acute car shortage developed. Coal is usually shipped in open top cars; and tipple mines, which are the largest producers of coal, can use only cars of that type. The supply of these being inadequate, the Midland, like other carriers, distributed the available open top cars among the tipple mines and its box cars among the wagon mines. Barkley and Burnett refused to accept box cars; and later brought, in an Arkansas court, this action against the Midland to recover damages for the alleged failure to furnish, during the period of the car shortage, an adequate supply of cars. By appropriate proceedings, the defendant objected to the maintenance of the action in the state court. It contended that the proper distribution of coal cars by interstate carriers in time of car shortage was an administrative question which Congress had committed to the Interstate Commerce Commission; and that the plaintiffs should have sought relief by application to that board. The trial court overruled the objection; the plaintiffs got a verdict; the judgment entered thereon was affirmed by the highest court of the State, 172 Ark. 898; and this Court granted a writ of certiorari. 275 U. S. 514. The only question for decision is whether the action lies.

The plaintiffs contend, and the state court held, that the action lay because it was brought to enforce the common law duty of the carrier to furnish cars, *Midland Valley*

R. R. Co. v. *Hoffman Coal Co.*, 91 Ark. 180, 189,—a duty confirmed by the statutes of the State (Crawford & Moses Arkansas Digest, 1921, § 895), and recognized by the Interstate Commerce Act. They argue that the right to bring an action in the courts of a State for a breach of that duty has been specifically preserved to the shipper by § 22 of the Interstate Commerce Act which declares that "nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies"; that the plaintiffs made no attack, open or covert, upon any regulation or order of the Commission relating to the supply or distribution of cars, compare *Lambert Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377; that consequently no administrative question was involved, compare *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285; and that the case is governed by *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, and *Pennsylvania R. R. Co.* v. *Sonman Shaft Coal Co.*, 242 U. S. 120, rather than by *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, and *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304.

The assertion that no administrative question is here involved rests upon a misapprehension. It may be assumed that there was no order of the Commission which required the Midland to distribute all available open top cars among the tipple mines. But the reasonableness of the Midland's practice in doing so, and in allotting box cars to the wagon mines, was the substantial matter in controversy. The right of a shipper to cars is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it

had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers. The reasonableness of the rule adopted by the carrier is a matter for the Commission. *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 133, 134. In the case at bar, the right of the plaintiffs to recover depended upon whether the defendant's practice of distributing its open top cars to tipple mines and its box cars to wagon mines was reasonable. The practice is one which was generally adopted in times of car shortage by rail carriers in the same territory; which had, under like circumstances, been prescribed by general orders of the Director General;[1] which had been to some extent prescribed by the Interstate Commerce Commission;[2] and the propriety of which in individual cases has been repeatedly the subject of consideration by the Commission on applications by shippers for relief.[3] It was clearly one of those questions which, as recognized in the *Puritan* case, calls for "the

[1] By an order dated June 17, 1918, the Regional Directors were instructed that "open top cars suitable and available for loading at tipple mines should be first supplied to such mines and should not be supplied to wagon mines until the tipple mines have been supplied." This modified an earlier order of March 20, 1918, which had directed that open top cars should not be furnished to wagon mines for loading on public team tracks if box cars were available for such loading.

[2] By notice of March 2, 1920, the Commission recommended that the rules as to the distribution of coal cars embodied in Railroad Administration Car Service Section Circular CS–31, issued September 12, 1918, revised December 23, 1919, be continued in effect. See *In re Rules Governing Ratings of Coal Mines*, 95 I. C. C. 309, 320. This recommendation appears to have been generally accepted by the carriers. Compare *Winding Gulf Colliery Co.* v. *Virginian Ry. Co.*, 102 I. C. C. 41. From time to time the Commission has issued emergency orders governing the distribution of coal cars, under the power conferred by paragraph 15 of § 402 of Transportation Act, 1920, c. 91,

exercise of the regulating function of the Commission." p. 133. Compare *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506.

In the case at bar, the adequacy of the carrier's supply of open cars in normal times was not seriously questioned; there was no suggestion that the plaintiffs' mine had been discriminated against; and the only substantial complaint was that the Midland's practice in allotting the open top cars to the tipple mines was illegal. Thus the facts are unlike those in which actions at law for failure to furnish cars have been entertained. In *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, and in *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S. 275, the claim was that, under a rule confessedly valid, the carrier had discriminated against the plaintiff. In *Eastern Railway*

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41 Stat. 456, 476. Several of these orders recognize the necessity of a distinction, in time of shortage, between wagon and tipple mines. By Service Order No. 14, issued August 25, 1920, the Commission directed that on any day when a carrier was unable to supply all mines on its line with the required open top cars, such cars should not be furnished to wagon mines which were unable to load on private tracks and from a tipple or like arrangement, until all tipple mines had been supplied. This was rescinded by Service Order No. 17, effective September 19, 1920, which, however, prohibited a carrier from furnishing open top cars in time of shortage to mines which did not customarily load cars within 24 hours of the time of placement, a prohibition which would include most wagon load mines. This order was vacated March 6, 1921. A similar requirement was incorporated into Service Order No. 25 by Amendment No. 1, effective October 17, 1922. Service Order No. 25 applied only to common carriers "east of the Mississippi River, including the west bank crossings thereof"; it was vacated December 11, 1922.

[3] *Thompson* v. *Pennsylvania R. R. Co.*, 10 I. C. C. 640; *Swaney* v. *Baltimore & Ohio R. R. Co.*, 49 I. C .C. 345. Compare *Glade Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 10 I. C. C. 226; *Northern Coal Co.* v. *Mobile & Ohio R. R. Co.*, 55 I. C. C. 502; *Griffith* v. *Jennings*, 60 I. C. C. 232; *Dickinson Fuel Co.* v. *Chesapeake & Ohio Ry. Co.*, 60 I. C. C. 315.

Co. v. *Littlefield*, 237 U. S. 140, the claim was that the carrier, knowing of the car shortage, had not only failed to notify the shipper but had accepted the shipment. In *Pennsylvania R. R. Co.* v. *Sonman Shaft Coal Co.*, 242 U. S. 120, 125–127, the action was for failure to supply cars in confessedly normal times. Compare *Pennsylvania R. R. Co.* v. *Stineman Coal Co.*, 242 U. S. 298, 300–301. In none of those cases was the reasonableness of the carrier's practice in controversy.

We have no occasion to consider whether the then existing orders of the Commission required the Midland to adopt the practice followed. Nor need we determine, whether by the amendments of the Interstate Commerce Act made in Transportation Act, 1920, c. 91, § 402, pars. 10–17, 41 Stat. 456, 476, and the Act of September 22, 1922, c. 413, 42 Stat. 1025, Congress evinced the intention to occupy the field of regulating the distribution of coal cars, and thereby abrogated the preëxisting limited right to sue in a state court for failure to supply cars.

Reversed.

HUMES ET AL. v. UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 376. Argued March 9, 1928.—Decided April 9, 1928.

Under § 403 (a) (3), of the Revenue Act of 1918, which provides that bequests to charitable corporations may be deducted in determining the net estate subject to estate tax, a contingent bequest the value of which cannot be determined from any known data but depends on mere speculation, is not deductible. P. 493.

63 Ct. Cls. 613, affirmed.

CERTIORARI, 275 U. S. 515, to a judgment of the Court of Claims, rejecting a claim for refund of part of an estate tax.

Mr. A. L. Humes, with whom *Mr. Milward W. Martin* was on the brief, for petitioners.

The will bequeathed approximately twelve million dollars to charity, the bequests to be defeated if a fifteen-year-old unmarried girl should live to be forty or should die leaving issue. It is obvious that the fact that the bequests were subject to be defeated by the subsequent event reduced their present value, but did not prevent them from being "bequests" or from having present value.

It is impossible to foretell definitely what value any future interest, even a life estate, will turn out to have, but the present value of such an interest is legally determinable if the probabilities involved are all shown by the standard mortality and probability tables.

The charities received a vested interest in a contingent estate, and such an interest is a present property right having present value. Chaplin on Suspension of the Power of Alienation (2d Ed.), p. 87; 2 Washburn, Real Property (6th Ed.), p. 527, § 1557; *Clarke* v. *Fay,* 205 Mass. 228; *Heath* v. *Widgeon,* (1907) 2 Ch. D. 270; *Stringer* v. *Barker,* 110 N. Y. App. Div. 37; *In re Twaddell,* 110 Fed. 145; *In re Hoadley,* 101 Fed. 233; *Nat'l Park Bank* v. *Billings,* 144 N. Y. App. Div. 536.

The present value of a property right that is dependent upon some future event may be determined by the use of standard mortality and experience tables, and by the calculations and testimony of actuaries. *Dugan* v. *Miles,* 292 Fed. 131; *United States* v. *Fidelity Trust Co.,* 222 U. S. 158; *Simpson* v. *United States,* 252 U. S. 547.

The present value of a bequest that is subject to be defeated by some subsequent event, may well involve identically the same probabilities as the present value of a bequest that is absolutely vested and hence the attempt to distinguish between them is unjustifiable. *Cushman* v. *Cushman,* 116 N. Y. App. Div. 763; and *Kahn* v. *Bowers,* 9 F. (2d) 1018, distinguished.

It has been adjudicated in other cases that the value of bequests identical with the charitable bequests in the present case is, for legal purposes, determinable from the standard experience tables. *Heath* v. *Widgeon*, (1907) 2 Ch. D. 270; *Clarke* v. *Fay*, 205 Mass. 288; *Ex parte Thistlewood*, 19 Vesey, Jr., 236. See *Shover* v. *Myrick*, 4 Ind. App. 7.

In the following cases, to prove the present value of some future interest, the opinion and calculations of an expert actuary were admitted in evidence and accepted as reliable. *Thayer* v. *Denver, etc. Co.*, 21 New Mex. 330; *Fort Worth, etc. Ry. Co.* v. *Spear*, 107 S. W. 613; *St. Louis, etc. Ry. Co.* v. *Hall*, 106 S. W. 194; *Galveston, etc. Ry. Co.* v. *Cooper*, 2 Tex. Civ. App. 42; *Clark County Cement Co.* v. *Wright*, 16 Ind. App. 630.

In the following cases, it was held that the value of such interests could be shown from standard mortality tables, and the values thus shown were accepted as reliable: *Simpson* v. *United States*, 252 U. S. 547; *United States* v. *Fidelity Trust Co.*, 222 U. S. 158; *Pierce* v. *Tennessee, etc. Co.*, 173 U. S. 1; *Vicksburg Ry. Co.* v. *Putnam*, 118 U. S. 545. See also *Western Assurance Co.* v. *Mohlman*, 83 Fed. 811, certiorari denied, 168 U. S. 710.

The deduction must be taken now, for if the executors should wait until the contingency happens, and then, if the charities receive the property, claim a refund, the claim for refund would be barred by the statute of limitations. The purpose of Congress in allowing the deduction of charitable bequests, was to encourage such bequests. That purpose shows that the statute should be broadly applied. *Edwards* v. *Slocum*, 264 U. S. 61.

Solicitor General Mitchell, with whom *Mr. T. H. Lewis*, Special Attorney, Bureau of Internal Revenue, was on the brief, for the United States.

Whether or not contingent bequests to charity may be deductible under some circumstances, the value of the

charitable bequests here are not ascertainable, and not presently deductible. *Kahn* v. *Bowers,* 9 F. (2d) 1018; 5 Am. Fed. Tax Rep. p. 5888; *Herron* v. *Heiner,* 1928 Prentice-Hall Tax Service, Vol. 1, p. 164; *First Nat'l Bank* v. *Snead, id.* 426; *Ithaca Trust Co.* v. *United States,* 64 Ct. Cls. 686; *Dugan* v. *Miles,* 292 Fed. 131.

The use of mortality tables to determine values of life estates has been approved in tax cases. *United States* v. *Fidelity Trust Co.,* 222 U. S. 158; *Simpson* v. *United States,* 252 U. S. 547.

There has been no provision in the Revenue Acts expressly to the effect that readjustment of estate taxes may be made at any time in the distant future on which, through the happening of future events, uncertainties of the kind here involved are removed. The statutes of limitation provide that claims for refund must be filed within a limited time. It is the practice of the Treasury Department, however, if a claim for refund is filed within the prescribed time and is denied on the conditions as they stand, to allow the taxpayer to have the claim reopened and reconsidered at any time in the future on the production of new evidence or developments; and so in this case, although the application for refund has necessarily been denied because the value of the bequest to charity is not now ascertainable, the way may be open in the future, if the developments justify it, to apply for a reconsideration of the claim and then obtain a readjustment. T. D. 3240, Vol. 23, Treasury Decisions (Internal Revenue) p. 830.

Mr. Justice Brandeis delivered the opinion of the Court.

This action was brought in the Court of Claims by the executors of Dellora R. Gates to recover $120,508.50, a part of the estate tax alleged to have been illegally exacted under the Revenue Act of 1918, c. 18, § 403, 40 Stat. 1057,

1098. The basis of the claim is that a sum of $482,034, which was disallowed in ascertaining the net estate taxable, should have been cted from the gross amount of $11,783,072.30 disposed oy Article Fifty-first of the will. The sum disallowed represents the alleged present value of certain contingent bequests to charities made by that article. The question for decision is whether the alleged present value of such contingent bequests is deductible under § 403, par. (a), sub-par. 3, of the Revenue Act. The Court of Claims held that the Commissioner of Internal Revenue was right in refusing to allow the deduction. 63 Ct. Cl. 613. This Court granted a writ of certiorari. 275 U. S. 515.

The governing provision of the Act is: "That for the purpose of the tax the value of the net estate shall be determined—(a) In the case of a resident, by deducting from the value of the gross estate— . . . (3) The amount of all bequests . . . to or for the use of any corporation organized and operated exclusively for . . . charitable . . . purposes." Allowance of the deduction was denied pursuant to Treasury Department Regulations 37, Article 56, which declared: "Conditional Bequests.—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed."

Article Fifty-first of the will gives one-half of the residuary estate to the testatrix's trustees in trust for her niece, Dellora F. Angell, portions of the principal to be paid to her upon her attaining the ages of thirty and thirty-five years, the balance to be paid to her upon her attaining the age of forty, the income to be paid to her in the meantime.

In the event that the niece should die without issue before attaining the age of forty, the amount of the principal not paid to her was given to charities. The remaining half of the residue was to be held in trust for the testatrix's brother during his life, the principal to be disposed of on his death in like manner as the half first mentioned. The testatrix died in 1918. Dellora F. Angell was then living, was fifteen years old and was unmarried. The contention of the executors is that the bequests gave the charities a present property right in the estate; that the present value of a property right which is dependent upon some future event may be determined by the use of standard mortality and experience tables and by the calculations and testimony of actuaries; that the value so determined of the contingency that the whole or a part of the gift would go to charities is at least $482,034; that the deduction must be taken now, for if the executors should wait until the contingency happens and then, if the charities receive the property, claim a refund, the claim for refund would be barred by the Statute of Limitations; and that, because it was the purpose of Congress to encourage bequests for charitable purposes, the act should be construed so as to allow such a deduction.

The Court of Claims did not find that the present value of the contingent bequests to the charities can be determined by the calculations of actuaries based upon experience tables. No basis is laid in the record for supplementing the findings in this respect. But the executors urge that we may take judicial notice that such tables exist; and that, by the use of them, actuaries are able to determine that in 1918 the possibility that the residuary gift of $11,783,072.30, or a part thereof, would ultimately go to the charities was worth at least $482,034; or in other words, 4.0909 per cent of the amount of that residue. The figure, $482,034, we are told, is reached, through the actuarial art, by some combination and adjustment of the

standard experience table of mortality long in use (see *Simpson* v. *United States,* 252 U. S. 547, 550) with two other tables which are relatively little known and which do not appear to have ever been used in America in legal proceedings. One of these is supposed to show what the probability is that a woman dying at a given age will die unmarried; the other to show what the probability is that if she marries, she will die childless.

If all the facts stated had been embodied in findings, no legal basis would be laid for the deduction claimed. The volume and character of the experience upon which the conclusions drawn from these two tables are based, differ from the volume and character of the experience embodied in standard mortality tables, almost as widely as possibility from certainty. Both of these tables, are based on data contained in volumes of Lodge's Peerage. The first table, which may be found in the Transactions of the Faculty of Actuaries in Scotland, Vol. 1, pp. 278–279, and is called Lees' Female Peerage Tables, was constructed by M. Mackensie Lees. It deals with 4,440 lives, of whom 2,010 died during the period of observation. The second of the tables, which may be found in an article entitled "On the Probability that a Marriage entered into by a Man of any Age, will be Fruitful," in the Journal of the Institute of Actuaries of Great Britain, Vol. 27, pp. 212–213, was constructed by Dr. Thomas Bond Sprague. It deals with the experience of 1,522 male members of the Scotch peerage and purports to show the probability that a marriage will be childless both as respects men married as peer or heir apparent and men who did not marry as peer or heir apparent. In order to apply the latter table to females certain assumptions and adjustments are necessarily made. It was on such data that the petitioners sought to set a money value on the probability that this Texas girl of fifteen will not marry, or if she does, will die without issue before the

age of thirty, or thirty-five, or forty. Obviously, the calculation that the contingent interest of the charities was equal to 4.0909 per cent of the residue, was mere speculation bearing the delusive appearance of accuracy.

One may guess, or gamble on, or even insure against, any future event. The Solicitor General tells us that Lloyds of London will insure against having twins. But the fundamental question in the case at bar, is not whether this contingent interest can be insured against or its value guessed at, but what construction shall be given to a statute. Did Congress in providing for the determination of the net estate taxable, intend that a deduction should be made for a contingency, the actual value of which cannot be determined from any known data? Neither taxpayer, nor revenue officer—even if equipped with all the aid which the actuarial art can supply—could do more than guess at the value of this contingency. It is clear that Congress did not intend that a deduction should be made for a contingent gift of that character. Compare *Edwards* v. *Slocum*, 264 U. S. 61, 63.

Affirmed.

GROSFIELD ET AL. *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 62. Argued January 4, 1928.—Decided April 9, 1928.

1. The purpose of the provision of the National Prohibition Act authorizing an injunction against occupation and use of premises where liquor has been unlawfully manufactured, etc., is not punitive, but preventive. P. 497.
2. In a suit under this section against the owner of leased premises based on illegal manufacture of liquor by the tenant, lack of criminal participation by the owner is not a defence; nor is the fact that the tenant was ousted and the illegal use ended before the

decree conclusive against granting the injunction, if the conduct and statements of the owner furnish reasonable ground for apprehending a repetition of the use. P. 498.

3. After the injunction has been decreed, power remains in the District Court to permit the premises to be occupied or used upon the giving of a bond with sufficient surety in the amount and upon the conditions prescribed by the statute. P. 499.

District Court affirmed.

REVIEW of a decree of the District Court enjoining the use, for the period of one year, of premises owned by Grosfield and Caplis, the defendants in a suit brought by the United States under the Prohibition Act. The case first reached this Court through questions propounded by the Circuit Court of Appeals, to which it had been appealed. This Court ordered up the entire record.

Messrs. Harold Goodman and *Edwin R. Monnig* submitted for Grosfield and Caplis.

Solicitor General Mitchell, with whom *Assistant Attorney General Mabel Walker Willebrandt* and *Mr. Norman J. Morrison,* Attorney in the Department of Justice, were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This case came here from the court of appeals on certificate submitting certain questions upon which that court desired instruction. Upon an order requiring it, the entire record has been sent up for consideration. Judicial Code, § 239, as amended February 13, 1925, by c. 229, 43 Stat. 936, 938.

Suit was brought by the United States on March 11, 1925, in the federal district court for the Southern Division of the Eastern District of Michigan, against Grosfield and Caplis, owners, and Silverman, tenant, to enjoin the

use of certain premises for the manufacture or sale of intoxicating liquor and to close such premises, as a common nuisance, for a period of one year. On March 30th, Grosfield and Caplis filed an answer, among other things denying that the premises were a common nuisance, and alleging that, as to whether intoxicating liquor was sold, kept or bartered upon the premises, they had no knowledge or information sufficient to form a belief; that the first information they received that the premises were used for illegal purposes was contained in a newspaper account of a raid [made January 17, 1925] containing the information that various appliances for the manufacture of intoxicating liquor had been found and seized; that Silverman upon being spoken to declared that there would be no violations of law upon the premises, that everything of an unlawful nature had been taken out, and a lease of the premises was being negotiated for the storage of paper; that, thereafter, upon the receipt of a copy of the bill of complaint, steps were taken by defendants to terminate Silverman's tenancy; and that they will proceed to oust him from the premises. On July 10, 1925, after a hearing, the bill was dismissed as to Silverman and a decree entered against Grosfield and Caplis in accordance with the prayer. No effort appears to have been made by those defendants to secure an order from the district court allowing them to give a bond so as to permit the continued occupation and use of the premises. The only question for our consideration is whether the evidence submitted to the district court is sufficient to justify the decree.

By § 21, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 314, any room, house, etc., where intoxicating liquor is manufactured, sold, kept, or bartered in violation of that title, is declared to be a common nuisance. By § 22, it is provided that an action to enjoin such nuisance may be brought in the name of the United States,

to be tried as an action in equity; that it shall not be necessary for the court to find that the property involved was being unlawfully used at the time of the hearing, but if the material allegations of the petition are found to be true the court shall order that no liquor shall be manufactured, sold, etc., in such room, house, etc.; that upon judgment abating the nuisance the court may order that the premises shall not be occupied or used for one year thereafter, but may in its discretion permit them to be occupied or used upon the giving of a bond with sufficient surety in the sum of not less than $500 nor more than $1,000 conditioned that intoxicating liquor shall not thereafter be manufactured, sold, etc.

Evidence was introduced by the Government to the effect that on January 17, 1925, nearly two months before this suit was brought, police officers entered the premises involved (then in Silverman's possession) and there found and seized two 300-gallon copper stills in operation, two copper tanks and other appliances used for the purpose of manufacturing intoxicating liquor, 8,500 gallons of sugar mash, and 60 gallons of whiskey distillate. Grosfield, who was the only witness for the defendants, testified: "I rented these premises to Silverman for the purpose of storing hay and straw. I had no knowledge of any illegal use of the premises until this case. I have caused the tenancy of Silverman to be terminated and have rented the entire rear part of the building to the Boston Paper Company for the storage of paper." Being asked by the court: "You did not remove this tenant before the institution of these proceedings?" he answered: "I had no knowledge that the premises were used in this way until these proceedings were started."

Considering the evidence in connection with the sworn answer of the defendants, we cannot say that the decree is without adequate support. The purpose of the provision of the statute authorizing an injunction against

occupancy and use is not punitive but preventive, *Murphy* v. *United States,* 272 U. S. 630, 632; and it is no answer to the suit to say that the owner did not participate in the criminal act of the tenant. That the tenant may have been ousted and the illegal use of the premises ended before the decree is not conclusive, if the evidence furnish reasonable ground for apprehending a repetition of such use. *United States* v. *Pepe,* 12 F. (2d) 985, 986; *Schlieder* v. *United States,* 11 F. (2d) 345, 347; *United States* v. *Boynton,* 297 Fed. 261, 267–268; *Grossman* v. *United States,* 280 Fed. 683, 685–686. The evidence discloses that the illegal use of the premises was discovered nearly two months prior to the bringing of this suit, with full knowledge of which discovery defendants fairly may be charged, having read a newspaper account of the raid and talked with Silverman about it. When the answer was filed, although two and one-half months had elapsed, Silverman was still in possession, and the answer contains the averment only that steps had been taken to terminate his tenancy and a promise that defendants would proceed to oust him. The tenancy was from month to month. The circumstances called for prompt action; and the failure of the owners of the premises to take any steps to remove the offending tenant until after the suit had been brought against them evinces a lack of concern not easily reconcilable with a real desire upon their part to make sure that the evil use of their property would not be repeated. Grosfield's statement—made in response to the interrogative suggestion of the court that the tenant was not removed before the institution of these proceedings—that he had no knowledge that the premises were being improperly used until the proceedings were begun, is inconsistent with the averment in the answer that he had read the newspaper account in respect of the unlawful use of the premises disclosed by the raid of January 17th.

That defendants, long before the suit against them was begun, knew of the tenant's violation of law, is not open to reasonable dispute; and their delay until after suit to take steps to get rid of him, in the face of his criminal use of the premises, well might be attributed to a lack of good faith on their part. Nor is it unfair to say that their failure to act until complaint was served upon them, evidences a surrender to the unavoidable rather than a voluntary effort to prevent a renewal of the nuisance. The trial judge who saw Grosfield and heard his testimony was better able to pass upon his credibility and trustworthiness than are we.

Upon consideration of all the circumstances, we find no ground for disturbing the conclusion upon which the decree must rest, namely, that the premises ought to be closed for a period long enough to end the probability of a recurrence of their unlawful use. We are the more content with this conclusion, since it is still within the power of the district court to permit the premises to be occupied or used upon the giving of a bond with sufficient surety in the amount and upon the conditions prescribed by the statute. See *United States* v. *Pepe, supra; Schlieder* v. *United States, supra,* p. 347.

Decree affirmed.

THE MONTANA NATIONAL BANK OF BILLINGS v. YELLOWSTONE COUNTY OF MONTANA ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 207. Argued January 20, 1928.—Decided April 9, 1928.

1. A substantial discrimination against national banks in favor of incorporated state banks resulting from taxation of national bank shares upon a valuation equal to that of the assets of the bank, including bonds and like securities of the United States, while the shares of the state banks are not taxed and the state banks them-

selves are taxed only on the value of their assets after excluding United States bonds and securities, violates Rev. Stats., § 5219. P. 502.

2. Taxation of shares of state corporate banks must be like that of shares of national banks, so far as necessary to prevent discrimination; in neither case does the exemption of federal securities held by the bank apply in taxation of the shares. *Des Moines Bank* v. *Fairweather,* 263 U. S. 103, distinguished. P. 503.
3. Where the shares of a national bank were taxed and the tax paid, under statutes then construed by the State Supreme Court as not permitting shares of state corporate banks to be taxed, but only the state banks themselves, thus creating a discrimination due to the inclusion of United States securities owned by the national bank in the valuation of its shares and to the necessary exclusion of like securities owned by the state banks in assessing their assets, *held*—(1) that the right of the national bank, suing for its shareholders, to challenge the validity of the statutes as so construed and applied, and to recover the taxes paid, was not affected by a decision of the State Supreme Court in the suit repudiating the earlier construction and declaring the state bank shares taxable; (2) that the fact that under the later decision the taxing officials were empowered to tax the shares of state banks and thus bring about equality, was not an obstacle to the suit, no intention to exercise the power having been manifested; and (3) that failure to apply to the county board of equalization for administrative relief was no bar to maintenance of the action, since the board had no power to grant it under the statute as construed when the taxes were imposed and collected. P. 504.

78 Mont. 62, reversed.

Error to a judgment of the Supreme Court of Montana, denying relief in an action by the bank to recover taxes on its shares collected by the county.

Mr. Horace S. Davis, with whom *Messrs. M. S. Gunn, Rockwood Brown,* and *R. G. Wiggenhorn* were on the brief, for plaintiff in error.

Mr. L. A. Foot, Attorney General of Montana, with whom *Messrs. A. H. Angstman* and *C. N. Davidson,* As-

sistant Attorneys General, were on the brief, for defendants in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Plaintiff in error, a banking corporation organized under the laws of the United States, is engaged in a general commercial banking business in Yellowstone County, Montana. For the year 1925, an assessment for taxes was made by the assessor of Yellowstone County upon the shareholders, based upon the value of their shares of stock in the bank. The bank owned no real estate. In pursuance of the assessment, taxes were levied in the aggregate sum of $3,897.84 and demand was made for the payment of fifty per cent. of that amount, as provided by the Montana statutes. The bank paid the sum demanded under protest, claiming that the assessment and levy and the statutes of Montana under which they were made were invalid as being in conflict with Rev. Stats. § 5219, with certain provisions of the constitution of Montana, and with the due process and equal protection of law clauses of the Fourteenth Amendment to the Constitution of the United States. This action was then brought by the bank in behalf of its shareholders to recover the amount of the payment. The court of first instance sustained a general demurrer to the complaint and rendered final judgment against plaintiff in error, which, upon appeal to the state supreme court, was affirmed. 78 Mont. 62.

Here the argument is confined to the question whether there is a violation of the restriction upon the state power of taxation contained in Rev. Stats. § 5219 that the taxation of shares of national banking associations "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

The contention that the laws of Montana, under which the assessment and levy were made, contravene this restriction, rests upon the fact that shares of national banks were valued for assessment purposes at an amount equivalent to the value of the corporate assets, including Liberty Loan bonds and similar securities of the United States, and were taxed accordingly, while shares of state banks were not assessed or taxed at all, and the banks themselves were taxed upon the value of their assets, after excluding such bonds and similar securities.

It is clear that the state statutes, as construed by the state supreme court *in the present case,* do not produce the discrimination asserted or any discrimination in favor of the moneyed capital employed by state banks in competition with national banks. That court now holds that the provisions of the state constitution and statutes require the state to tax the property of every state bank and also the shares to the extent that they have a value beyond that of the taxable property of the bank. In assessing and imposing taxes upon the corporations, the value of the United States securities owned by the corporations is excluded, because such securities are exempted from state taxation by the laws of the United States. But in the taxation of shares of state as well as of national banks, the value of these securities, so far as it contributes to the value of the shares, is included, because the shares are the property of the shareholders distinct from the corporate assets, which are the property of the banks. See *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 518.

If this were all, there would be no discrimination within the meaning of the federal law. But it is not all. The assessment, as actually made, clearly violated the restriction in § 5219 here relied upon; and it was made in conformity with the state statutes as construed by the state supreme court in the earlier case of *East Helena State*

Bank v. *Rogers*, 73 Mont. 210. In that case the requirement of the statutes, so far as it applied to state banks, was stated by the court as follows (p. 217):

"This state had the option to tax the shares of stock in state banks to the individual shareholders, or to tax the property of such banks to the banks themselves. It could not tax both at the same time. (Sec. 17, Art. XII, Constitution of Montana.) If it had chosen the first alternative, it might then have assessed the shares at their full cash value without reference to the character of the securities in which the bank's funds were invested (*Van Allen* v. *Assessors*, 3 Wall. 573, 18 L. Ed. 229 [see, also, Rose's U. S. Notes]); but it chose to tax the property of the banks, and must abide the consequences."

The taxing officials, conforming to this construction of the state law, as they were bound to do, while they assessed, levied and collected the tax now under review, laid no tax whatever upon shares of state banking corporations, although, as the record shows, these shares had a very large taxable value over and above the value of the taxable property of the banks, due to the ownership by the banks of tax-exempt federal securities. That this resulted in a substantial discrimination against plaintiff in error within the meaning of the restriction contained in § 5219 does not admit of doubt. *Van Allen* v. *Assessors*, 3 Wall. 573, 581; *Mercantile Bank* v. *New York*, 121 U. S. 138, 148, 152; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 677.

Nevertheless, it is contended for the defendants in error that, since the exemption from taxation of the federal securities in the hands of the state banks is created by federal statute, the discrimination is one which the state could not avoid. It is said that it was so decided in *Des Moines Bank* v. *Fairweather*, 263 U. S. 103. But this view of that decision is entirely erroneous. The statutes of Iowa there under review expressly provide that shares

of stock in national banks and state and savings banks and loan and trust companies located in the state shall be assessed to the individual stockholders; and shares of national banks and those of competing state corporations are put, for purposes of taxation, upon terms of exact equality. The provision of the Iowa statute which was assailed related to the assessment of capital employed by *individual* bankers (p. 105); and this Court held that the restriction of § 5219 was not violated because the state, perforce, allowed a deduction of federal securities in assessing the capital of such individual bankers; that the federal law made such securities exempt and the state merely respected the exemption. P. 117. The decision in no way affects the rule (*Van Allen* v. *Assessors* and other cases, *supra*) that in respect of the taxation of state *corporate* banks, the shares must be taxed as they are in the case of national banks, so far as necessary to prevent discrimination, and that, in neither case, does the exemption of federal securities apply in the taxation of such shares.

It is true that the state supreme court in the present case expressly repudiated the construction theretofore put by it upon the state statutes in the *Rogers* case, *supra,* and, as already stated, adopted one to the exact contrary. But that does not cure the mischief which had been done under the earlier construction. That construction had already been acted upon by the taxing officials and the application thus made of the statutes had given rise to the present cause of action and an undoubted right to recover thereon. The statutes, as thus construed and applied to the concrete facts of the case, were invalid; and this is enough to justify the challenge here under consideration. *Cudahy Co.* v. *Parramore,* 263 U. S. 418, 422; *Ward & Gow* v. *Krinsky,* 259 U. S. 503, 510. Plaintiff in error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it

by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.

But it is said that the taxing officers of the county, in view of the later decision, now have the power to tax the shares of state banks and thus bring about an equality. As to this it is unnecessary to say more than that it nowhere appears that these officers, if they possess the power, have undertaken to exercise it or that they have any intention of ever doing so. It will be soon enough to invite consideration of this purely speculative suggestion when, if ever, the taxing officials shall have put it into practical effect.

Finally, it is urged that plaintiff in error may not maintain this action because of its failure to apply to the county board of equalization for an administrative remedy. We do not stop to inquire whether under any circumstances such remedy was open to the taxpayer, for the short answer is that the decision of the Supreme Court of Montana in the *Rogers* case would have rendered any such application utterly futile since the county board of equalization was powerless to grant any appropriate relief in the face of that conclusive decision. See *Hills* v. *Exchange Bank,* 105 U. S. 319, 321; *Whitbeck* v. *Mercantile Bank,* 127 U. S. 193, 199. Compare, *First Natl. Bank* v. *Weld County,* 264 U. S. 450, 454–455.

Judgment reversed.

DONNELLEY v. UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 110. Argued November 22, 1927. Reargued January 19, 1928.—Decided April 9, 1928.

1. After certification of a question by the Circuit Court of Appeals, the entire record was ordered up. Plaintiff in error filed no state-

ment of points or specification of errors to be relied on, nor any brief other than one filed after the certification, dealing with the question certified. *Held* that review would be confined to that question. Rule 25, Par. 2 (e), Par. 4; Rule 11, Par. 9. P. 511.

2. The general clause of § 29, Title II of the Prohibition Act providing that any person who "violates any of the provisions of this Title for which offense a special penalty is not prescribed, shall be fined for the first offense not more than $500" etc., applies to a prohibition director who, having knowledge that a person has possessed and transported intoxicating liquor contrary to the Act, violates his duty under § 2 by intentionally failing to report the case to the United States Attorney. P. 511.
3. The rule that penal statutes are to be strictly construed in favor of persons accused, is not violated by allowing the language to have its full meaning where that construction is in harmony with the context and supports the policy and purposes of the enactment. P. 512.
4. Public officers are not attended by any special presumption that general language in disciplinary measures does not extend to them. P. 516.

District Court affirmed.

REVIEW of a judgment of the District Court for the District of Nevada, sentencing Donnelley, a prohibition director, for wilful failure to report a violation of the Prohibition Act. The case came here first on a question certified by the Circuit Court of Appeals. The whole record was then ordered up.

Mr. Frank H. Norcross, with whom *Mr. Henry M. Hoyt* was on the brief, for Donnelley.

Section 2 was not intended to define or embrace a penal offense. An attempt to give it a penal character leads to absurd results. So construed, the Commissioner of Internal Revenue, his assistants, agents and inspectors, are guilty of a misdemeanor if they fail to investigate and report any violation of the Act coming to, or which should have come to, their knowledge. A third dereliction would amount to a felony. So construed, it becomes

the duty of the Commissioner, his assistants, agents and inspectors, not only to investigate offenses in connection with liquor violations, but each must investigate every other officer with whom he is associated and report him if such officer has failed so to investigate and report.

The section is a purely administrative provision prescribing in the most general language, and not with the particularity required in penal provisions, the duty of administrative officers in investigating and reporting such violations of the Act as are by its terms made "offenses."

If § 2 is penal, then Congress intended to take all discretion from officers entrusted with enforcement, and they cannot, as has been the practice, without themselves becoming violators, determine what class or character of violators it is most advantageous, for the purpose of real enforcement, to investigate and report, nor determine in any case under investigation when or whether evidence has been secured sufficient to justify prosecution.

Section 38 of the Prohibition Act provides for three classes of officers, two of which are specifically designated as "executive officers" and as "agents and inspectors in the field service," and the third class includes experts, clerical assistants, etc. By the very terms of the statute, executive officers have nothing to do with the real work of investigating officers.

By the provisions of §§ 1800 and 1810 of Article XVIII of the Regulations prescribed by the Commissioner of Internal Revenue, the Director must maintain an office not to be closed within certain prescribed hours and must be in attendance except when on leave or temporary absence. By the terms of the Regulations, the Director cannot be an investigating officer in the strict or practical sense. Upon the other hand, it is equally as manifest that investigating or field officers are not supposed to make reports to the United States Attorneys of the re-

sults of their investigation, which is the appropriate function of the directing officers under whatever name designated.

If § 2 is penal, it is not enough for an officer either to investigate or report; he must do both, regardless of the general character of his duties, and this of course, applies to the Commissioner of Internal Revenue especially.

Section 2 fails to say when reports shall be made. An offense may be discovered, but it may take weeks, months, or even years, to discover the offender and secure evidence to justify prosecution. Must an efficient officer report bare knowledge of an offense, and thus frustrate efforts to discover the perpetrator, or may he exercise his judgment as to when is the proper time to report? Is a prohibition officer subject to prosecution because his judgment happens to differ from that of a United States Attorney as to when an offense should be reported?

Section 2 contains not a single characteristic of a penal statute. Few reading it would ever suspect that it might be so intended. Even if it had included a specific provision that a violation of it would constitute an offense, an officer could not tell what he would have to do to comply with its terms so as to be immune from punishment.

Section 29 was not intended to apply to the purely administrative provisions of the Act. The general clause is limited to the same character of offenses previously specifically mentioned. The rule of *ejusdem generis* is clearly applicable.

The use of the word " offense " in the general clause indicates a legislative intent to prescribe a punishment only for the violation of those prohibitions or commands in relation to manufacture, transportation or disposition of liquor, which it was the purpose of the Act to regulate or prevent, and for which offenses a special penalty had not been prescribed.

It is inconceivable that Congress contemplated that the Commissioner of Internal Revenue and his subordinate officers might be repeatedly prosecuted and punished for violating the administrative provisions of the Act. *United States* v. *Seibert,* 2 F. (2d) 80.

It has never been the theory of the Government that public officers will perform their duties only in fear of prosecution for dereliction of duty. Only in rare instances and exclusively in matters pertaining to public revenues, is a failure to make reports made penal, and in those cases the time and character of the report are clearly prescribed and the penalty for failure definitely expressed. Rev. Stats. § 3169; Comp. Stats. § 5889.

A construction of the Act which would provide the means for meddlesome interference with the policy of executive enforcement officers would be far from a liberal construction "to the end that the use of intoxicating liquor as a beverage may be prevented."

A new offense will not be deemed to have been created by statute unless the legislature has expressed its will in language sufficiently explicit to be apparent to the common mind. It is only when a statute clearly and plainly subjects parties and acts to its denunciation that they may be lawfully punished thereunder. *Connally* v. *General Construction Co.,* 269 U. S. 385; *United States* v. *Noveck,* 272 U. S. 202; *United States* v. *Katz,* 271 U. S. 354; *United States* v. *Reese,* 92 U. S. 14; *First Nat'l Bank* v. *United States,* 206 Fed. 374.

Assistant Attorney General Mabel Walker Willebrandt, with whom *Solicitor General Mitchell* and *Messrs. Norman J. Morrisson* and *John J. Byrne,* Attorneys in the Department of Justice, were on the brief, for the United States.

The provision in § 29 that any person who violates any provision of Title II of the National Prohibition Act shall

be guilty of a criminal offense does not seem to have been intended to punish administrative officers and United States Attorneys for failure to perform the numerous duties imposed on them by the Act. While the question is one on which opinions may differ, the better reason supports the view that it was not intended by § 29 to punish as a crime the failure of an administrative officer to report to the United States Attorney a case justifying prosecution.

If the statute is construed to make that an offense, then it was error for the trial court to refuse to charge the jury that a violation of the Act did not occur unless the official had evidence sufficient to reasonably warrant prosecution. The other charges refused or given and complained of do not disclose prejudicial error.

If the statute covers the case, the evidence was sufficient to go to the jury on the question whether the plaintiff in error had in bad faith neglected to report for prosecution a case where he had sufficient evidence to warrant prosecution.

Mr. Justice Butler delivered the opinion of the Court.

Defendant was the Prohibition Director for Nevada. An information filed in the United States court for that district charged that he, having knowledge of the unlawful possession and transportation of intoxicating liquor by one Curran, did wilfully and unlawfully fail to report such violations to the United States Attorney. The jury found him guilty and the court imposed a fine of $500. Alleging various grounds for reversal, he took the case to the Circuit Court of Appeals. That court, acting under § 239 of the Judicial Code, certified to this Court a question concerning which it desired instruction. Defendant submitted the question upon a brief. Later we required the entire record to be sent up, and so brought

the case here for decision. The United States filed additional briefs. Oral arguments were made for the respective parties. But defendant failed to submit any other brief or to file any statement of points or specification of errors intended to be urged here. Rule 25, Par. 2(e), Par. 4. And see Rule 11, Par. 9. We confine our consideration to the question argued in his brief. *Southeastern Express Co.* v. *Robertson,* 264 U. S. 541. *Home Benefit Association* v. *Sargent,* 142 U. S. 691, 694–695. The substance of the contention is that intentional failure of a prohibition director or other enforcement officer, having knowledge of crimes and offenders against the Act, to report them to the United States Attorney is not a punishable offense.

Section 2, Title II, of the National Prohibition Act (c. 85, 41 Stat. 305, 308; U. S. C., Tit. 27, § 11), provides: "The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States Attorney for the district in which committed, . . ." The Act does not specifically fix punishment for a violation of that provision. But § 29 provides that: "Any person . . . who . . . violates any of the provisions . . . for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500 . . ."

As there are no common law crimes against the Government (*United States* v. *Eaton,* 144 U. S. 677), each case involves the construction of a statute to determine whether the acts or omissions of the accused are denounced as punishable. And regard is always to be had to the familiar rule that one may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of an Act of Congress. *United States* v. *Lacher,* 134 U. S. 624, 628. *Todd* v. *United States,* 158 U. S. 278, 282. *Fasulo* v. *United States,* 272 U. S. 620, 629.

The evidence showed, and the verdict, when read in the light of the court's charge, means that the jury found that Curran was discovered transporting ten barrels of intoxicating liquor and that plaintiff in error, with actual knowledge of that violation, intentionally failed to report the crime and offender for prosecution. Plainly that was a violation of duty imposed on him by § 2. And § 29 declares that violators of any provision shall be punished. Taken according to their ordinary meaning, the words used are sufficient to make the facts alleged and found a punishable offense. The rule that penal statutes are to be strictly construed in favor of persons accused is not violated by allowing the language to have its full meaning where that construction is in harmony with the context and supports the policy and purposes of the enactment. *United States* v. *Hartwell,* 6 Wall. 385, 395. *United States* v. *Wiltberger,* 5 Wheat. 76, 95. Section 3 forbids a narrow or strict construction of the Act, and directs that all its provisions "shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

Diligence and good faith on the part of enforcement officers are essential. The great difficulties always attendant upon efforts to suppress the liquor traffic have been noticed and cited in a number of decisions of this Court. *Crane* v. *Campbell,* 245 U. S. 304, 307. *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, 282, 297. *Everard's Breweries* v. *Day,* 265 U. S. 545, 560. *Lambert* v. *Yellowley,* 272 U. S. 581, 595. The failure to enforce laws of the States passed to regulate or prohibit the sale of intoxicating liquor was one of the principal reasons for the adoption of the Eighteenth Amendment. Violations of such enactments were open and notorious. Connivance and cooperation between officers and offenders frequently existed. Those who drafted and passed the enforcement Act knew that national prohibition would be assailed by

influences more powerful than those that had embarrassed earlier and less sweeping state laws. Experience had shown that it would not do to leave prohibition enforcement officers free to determine what cases should be prosecuted and what ignored, and that mere imposition of duty to report offenders would not be enough. The infliction of punishment for their intentional violations is an appropriate measure to hold them to the performance of their duties.

The Act is comprehensive and discloses a legislative purpose fully to enforce the prohibition declared by the Eighteenth Amendment. *National Prohibition Cases,* 253 U. S. 350. *Corneli* v. *Moore,* 257 U. S. 491. *Vigliotti* v. *Pennsylvania,* 258 U. S. 403. *Grogan* v. *Walker & Sons,* 259 U. S. 80. *Everard's Breweries* v. *Day, supra. Lambert* v. *Yellowley, supra.* The forfeitures, fines and imprisonments unquestionably provided for show an intention to compel obedience. Congress was not content to impose duties and merely direct their performance; it diligently provided means for enforcement. An abridged reference to the things denounced as unlawful or expressly forbidden and those by the Act commanded to be done will be sufficient to indicate how thoroughly Congress intended to enforce this Article. The Act prohibits beverages having as much as one-half of one per cent. of alcohol by volume (§ 1). It declares that no person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess such liquor except as authorized by the Act. (§ 3.) Denatured alcohol, medicinal, toilet and other preparations unfit for beverage purposes are not forbidden, if they correspond with the descriptions and limitations specified. Purchase and possession of liquor to make such articles are allowed, but manufacturers are required to procure permits, give bonds, keep records and make reports. (§ 4.) No person is allowed without a permit to manufacture, sell, purchase, transport

or prescribe liquor, but one may purchase and use it for medicinal purposes when prescribed by a physician. (§ 6.) No one but a physician holding a permit may issue a prescription for liquor. And no physician is allowed to prescribe it unless, upon an examination or the best information obtainable, he believes its use as a medicine is necessary and will afford relief from some known ailment. No more than a pint of spiritous liquor shall be prescribed for the same person within ten days, and no prescription shall be filled more than once. Every physician is required to keep a record showing the date of every prescription, the amount prescribed, to whom issued, the purpose or ailment for which it is to be used, the amount and frequency of the dose. No physician may prescribe liquor and no pharmacist may fill any such prescription except on blanks furnished by the commissioner, and pharmacists are required to keep records of prescriptions filled. (§§ 7 and 8.) No person is allowed to manufacture, purchase for sale, sell or transport liquor without making a permanent record showing prescribed details. (§ 10.) Copies of permits to purchase must be preserved by the seller. (§ 11.) Manufacturers are required to attach labels showing details concerning liquor made and sold by them. (§ 12.) It is unlawful for any person to procure the transportation of liquor without giving the carrier notice of the character of the shipment. No carrier is permitted to transport and no person may receive liquor from a carrier unless there is shown upon the package, specified information as to consignor and consignee, and also the number of the permit allowing the transportation. (§ 14.) It is unlawful for any consignee to receive or any carrier to deliver any liquor in a container on which appears any statement known to be false. (§ 15.) It is unlawful to advertise liquor or to permit a sign advertising it to remain on one's premises (§ 17), or to advertise or to

possess for sale any utensil, substance or recipe intended for use in its unlawful manufacture (§ 18), or to give any information as to how liquor may be obtained in violation of law. (§ 19.) Every place where liquor is made, kept or sold in violation of the law is declared to be a nuisance, and the person who maintains it is liable to specified punishment. (§ 21.) It is declared that any violation on leased premises by the lessee or occupant shall work a forfeiture of the lease at the option of the lessor. (§ 23.) When an officer shall discover one transporting liquor in any vehicle in violation of law it is his duty to seize the liquors, take possession of the vehicle, arrest and proceed against the person in charge of it. (§ 26.)

A conservative analysis of the provisions of the Title is contained in one of the briefs filed by the Government. It shows eight provisions declaring specified things to be unlawful, eighteen prohibiting others and fifteen commanding the performance of various obligations imposed. Except for nuisance (§§ 21–23. Cf. §§ 24, 25), all punishments to be imposed on offenders are prescribed by § 29. Its substance follows. "Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined . . . or imprisoned . . ." Second and subsequent offenses are more severely to be punished. "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for the first offense not more than $500"; and heavier penalties are prescribed for second and subsequent offenses. Obviously Congress intended to provide for the punishment of the things declared to be unlawful and those specifically prohibited. And it is plain that there was no failure to provide measures for the enforcement of its commands. Undoubtedly the general clause of this

section covers unauthorized transportation, importation, exportation, delivery, possession and the advertising or possession for sale of anything intended for use in its unlawful manufacture. The clause is broad enough—and it is the only one—to make punishable violations of the provisions governing manufacturers, pharmacists, shippers and carriers. Undoubtedly Congress intended to penalize their violation of the duties imposed on them. And, unless it is to be restricted by implication in favor of enforcement officers, the general language used also covers violations of the provisions enacted to govern their official conduct.

But there is no support for a construction so restrained. It always has been deemed necessary to enact laws to compel performance of duty and to prevent corruption on the part of public officers. They are not attended by any special presumption that general language in disciplinary measures does not extend to them. Neglect of official duty is a misdemeanor at common law. Russell Crimes and Misdemeanors (7th Ed.), p. 601. *People* v *Herlihy*, 72 N. Y. S. 389, and cases cited. Intentional failure of enforcement officers to report violations is doubly injurious to the public. It encourages offenders and disgraces the law. Performance of duty by prohibition agents is quite as important as compliance with law by authorized manufacturers, physicians, pharmacists and carriers. The general clause in question applies to the latter. With equal reason it may be held to cover failures of enforcement officers to report for prosecution violations and offenders known to them. And that construction is consistent with the established policy of Congress. Similar neglect of duty has long been punishable. The Act of July 18, 1866,[1] imposes penalties upon collectors of customs and other officers for failure to make required

[1] § 42, c. 201, 14 Stat. 178, 188; R. S. § 1780; as amended by Act of March 4, 1909, § 101, c. 321, 35 Stat. 1088, 1107; U. S. C., Tit. 18, § 188.

reports. An Act of July 20, 1868,[2] provides that any revenue officer or agent who, having knowledge or information of the violation of the revenue laws, fails to report the same to his superior officer and the Commissioner of Internal Revenue shall be punished by fine and imprisonment. The duties of prohibition officers and revenue officers overlap. They are in the same department and directed by the same head. They are under like duty to report. Cf. R. S. § 3164, as amended; U. S. C., Tit. 26, § 26. Treasury regulations require that the reports of prohibition agents shall include statements of infringements of internal revenue laws also involved. Regulations 12, Art. 35. They are entitled to like protection against prosecution in state courts for acts done under color of their office. *Maryland* v. *Soper* (No. 1), 270 U. S. 9. And the policy of Congress is further shown by the Prohibition Act for the District of Columbia, which makes it an offense for any officer to fail to report violations to the corporation counsel.[3] These and other Acts[4] prescribing punishment for neglect of official duty strongly support the contention that Congress intended to make prohibition officers punishable for failure to make the reports required by § 2.

Defendant argues that, if the failure of enforcement officers to report violations be held punishable "they cannot . . . determine what classes or character of violators it is most advantageous, for the purpose of real enforcement, to investigate and report." But there is

[2] § 98, c. 186, 15 Stat. 125, 165; R. S. § 3169; U. S. C., Tit. 26, § 64. And see Act of February 8, 1875, § 23, c. 36, 18 Stat. 307, 312; U. S. C., Tit. 26, § 68.

[3] Act of March 3, 1917, § 21, c. 165, 39 Stat. 1123, 1129.

[4] Neglect of duty by employee in the census. § 22, c. 2, 36 Stat. 1, 8, reenacted as § 22, c. 97, 40 Stat. 1291, 1299; U. S. C., Tit. 13, § 44. Neglect of duty imposed by Alaska Game Commission Act, § 15, c. 75, 43 Stat. 739, 747; U. S. C., Tit. 48, § 202. Failure of guide to report violation of Alaska Game Law, § 5, c. 162, 35 Stat. 102, 104; U. S. C., Tit. 48, § 202.

nothing to indicate that any such determinations are to be made. Congress intended that prohibition officers should not intentionally fail to report violations and that the law should be enforced against all offenders. The general clause covers all violations except the relatively few specifically dealt with. And it reasonably may be held to apply to violations of official duties and to safeguard against connivance between officers and offenders. He also argues that the imposition of heavier penalties for second and subsequent offenses shows that the clause was not intended to apply to offending officers because, as it was said, they would not be in office after conviction. But that suggestion has little if any weight when it is remembered that the clause is aimed at so many violations and non-office-holding offenders. There is no rule requiring every part of the provision to apply to all classes covered by it. Cf. *United States* v. *Union Supply Company*, 215 U. S. 50, 55. Moreover, it is not impossible that an enforcement officer may be in office subsequent to a conviction for such an offense.

The construction contended for by defendant unduly restrains the language of the clause in question, is inconsistent with the context and contrary to the purposes of the Act and the policy of Congress. It is without substantial support and cannot be sustained. *Judgment affirmed.*

MR. JUSTICE SUTHERLAND and MR. JUSTICE SANFORD dissent.

BLACK AND WHITE TAXICAB AND TRANSFER COMPANY *v.* BROWN AND YELLOW TAXICAB AND TRANSFER COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 174. Argued January 13, 16, 1928.—Decided April 9, 1928.

A Kentucky railroad corporation made a contract with the plaintiff, a Tennessee corporation carrying on a transfer business at a city

in Kentucky, whereby it granted to plaintiff the exclusive privilege of going upon its trains, into its depot and on its surrounding premises to solicit transportation of baggage and passengers, and assigned a plot of ground belonging to it for the use of plaintiff's taxicabs while awaiting the arrival of trains, the plaintiff on its part agreeing to render certain services and to make monthly payments. The term of the contract was for one year, to continue for consecutive yearly periods until terminated by either party on thirty days' notice. Plaintiff was the successor of a Kentucky transfer corporation of the same name, which had had a like contract with the railroad company, and which was dissolved after its shareholders had incorporated the plaintiff and caused the property and business to be transferred to it. The purpose of the change of corporations and contracts, coöperated in by the railroad company, was to create a diversity of citizenship. In a suit brought by the plaintiff in the federal court in Kentucky, on the basis of diverse citizenship, to restrain another transfer corporation, created in Kentucky, from soliciting business and parking vehicles on the railroad premises in violation of plaintiff's exclusive contract, and to restrain the railroad company from permitting such violations, *Held:*

1. That the suit was not subject to dismissal under Jud. Code § 37, since the controversy was real and substantial, the plaintiff was the real party in interest, and the requisite diversity of citizenship existed. The coöperation between the plaintiff and the railroad company to have the rights of the parties determined by a federal court was not improper or collusive within the meaning of § 37. P. 524.

2. The contract did not exceed the railroad company's powers under its Kentucky charter. P. 525.

3. The contract is consistent with the provision of the Kentucky Constitution, § 214, forbidding any railroad company to make any exclusive or preferential arrangement for the conduct of any business as a common carrier. P. 526.

4. In the absence of any governing provision of local statutes or constitution, the question whether such a contract is against public policy, is one of general law. P. 526.

5. Under the common law, as construed and applied by this Court, by state courts generally, and by English courts, such contracts are valid. *Delaware etc. R. R. Co.* v. *Morristown*, 276 U. S. 182. P. 527.

6. Where the validity of a contract (in this case made in a State which has adopted the common law), involves no question of

land title, or of local statute or constitution, or of fixed local usage, but depends upon a question of general law, federal courts, while inclining to follow courts of the State in which the controversy arises, are not bound by Rev. Stats., § 721, to do so but are free to exercise their own, independent judgment. P. 529.

15 F. (2d) 509, affirmed.

CERTIORARI, 273 U. S. 690, to a decree of the Circuit Court of Appeals which affirmed a decree of permanent injunction against the above-named petitioner and the Louisville & Nashville Railroad Company, restraining violation of a contract between the railroad company and the respondent. The railroad company did not appeal.

Mr. N. P. Sims, with whom *Messrs. John L. Stout* and *Guy H. Herdman* were on the brief, for petitioner.

Dismissal of the action should have been ordered under § 37 of the Judicial Code. *Lehigh Mining Co.* v. *Kelly,* 160 U. S. 327; *Miller & Lux* v. *Canal Co.,* 211 U. S. 293; Foster's Fed. Prac., Vol. 1, p. 134; *Morris* v. *Gilman,* 129 U. S. 315.

The law as decided by the Kentucky Court of Appeals should be followed as controlling on the validity of the contract. *Hartford Fire Ins. Co.* v. *Chicago, etc., Ry. Co.,* 175 U. S. 91; *Equitable Life Ins. Co.* v. *Brown,* 213 U. S. 29; *Palmer* v. *Ohio,* 248 U. S. 32; *Hairston* v. *Danville Ry. Co.,* 208 U. S. 598.

If respondent's right in the contract be considered property, then the decision of the state court establishing a rule in regard to it is to be followed by the federal courts. L. R. A., 1916A, 1011; 40 L. R. A. (N. S.), 380, 412 to 433; *Guffey* v. *Smith,* 237 U. S. 101; *Hinde* v. *Vatter,* 5 Pet. 398; *Swift* v. *Tyson,* 16 Pet. 1; *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349.

Donovan v. *Pennsylvania Co.,* 199 U. S. 278, distinguished.

The contract is in excess of the railroad company's charter power. *McConnell* v. *Pedigo,* etc., 92 Ky. 465.

The contract was contrary to § 214, Kentucky Constitution, and therefore unenforceable. *L. & N. R. R. Co.* v. *Central Stockyards Co.,* 133 Ky. 148.

Mr. M. M. Logan for respondent.

Respondent, acting in good faith, was within its rights in obtaining its charter from Tennessee, although it may have done so for the purpose of conferring on the federal courts jurisdiction to determine controversies which might arise between it and the citizens of Kentucky. *Lehigh Mining Co.* v. *Kelly,* 160 U. S. 327, distinguished.

Federal courts are not compelled to follow the decisions of the local state courts on questions of general law. *Salem Trust Co.* v. *Manufacturers' Finance Co.,* 264 U. S. 182.

Donovan v. *Pennsylvania R. R. Co.,* 199 U. S. 278, decides all points raised in this suit against the contention of petitioner, except one question of fact, which has been decided against it both by the District Court and the Circuit Court of Appeals.

The Railroad Company has implied authority to do all acts necessary for the full and complete utilization of its special powers, which are not expressly or impliedly excluded by the terms of the grant. Aside from the transportation of freight and passengers, it may use its individual property as it pleases so as to make money for itself. *Louisville Property Co.* v. *Commonwealth,* 146 Ky. 847.

It is by reason of the implied authority which a railroad company has to use its private property as it pleases when the use does not relate to its transportation business that it may rent part of its depot and building for news stands,

restaurants, barber shops, and other like conveniences. If it may do this, it may lease to a taxicab company its grounds so that the employees of such company may come thereon and solicit business. It has the authority to keep off of its premises any person not having any business with it who desires to use its property for his personal gain.

The Railroad Company has implied authority under its charter to enter into contracts such as the one in controversy, *Louisville Property Co.* v. *Commonwealth, supra.*

The contract is not violative of § 214, Kentucky Constitution.

The contract was not made by the Railroad Company for the conduct of its business as a common carrier.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent sued petitioner and the Louisville and Nashville Railroad Company in the United States court for the western district of Kentucky to prevent interference with the carrying out of a contract between the railroad company and the respondent. The district court entered a decree in favor of respondent. The railroad company declining to join, petitioner alone appealed. The Circuit Court of Appeals affirmed, 15 F. (2d) 509, and this Court granted a writ of certiorari. 273 U. S. 690.

Respondent is a Tennessee corporation carrying on a transfer business at Bowling Green, Kentucky. The petitioner is a Kentucky corporation in competition with respondent. The railroad company is a Kentucky corporation. In 1925, it made a contract with respondent whereby it granted the exclusive privilege of going upon its trains, into its depot, and on the surrounding premises to solicit transportation of baggage and passengers. And

it assigned a plot of ground belonging to it for the use of respondent's taxicabs while awaiting the arrival of trains. In consideration of the privileges granted, respondent agreed to render certain service and to make monthly payments to the railroad company. The term of the contract was fixed at one year to continue for consecutive yearly periods until terminated by either party on thirty days' notice.

Jurisdiction of the district court was invoked on the ground that the controversy was one between citizens of different States. The complaint alleges that the railroad company failed to carry out the contract in that it allowed others to enter upon its property to solicit transportation of baggage and passengers and to park on its property vehicles used for that purpose. It alleges that petitioner entered, solicited business and parked its vehicles in the places assigned to respondent, and also on an adjoining street so as to obstruct the operation of respondent's taxicabs. Petitioner's answer alleges that respondent was incorporated in Tennessee for the fraudulent purpose of giving the district court jurisdiction and to evade the laws of Kentucky. It asserts that the contract is contrary to the public policy and laws of Kentucky as declared by its highest court, and that it is monopolistic, in excess of the railroad company's charter power and violates § 214 of the constitution of the State.

The record shows that, in September, 1925, respondent was organized in Tennessee by the shareholders of a Kentucky corporation of the same name then carrying on a transfer business at Bowling Green and having a contract with the railroad company like the one here involved; that the business and property of the Kentucky corporation were transferred to respondent, and the former was dissolved. Respondent's incorporators and railroad representatives, preferring to have this controversy deter-

mined in the courts of the United States, arranged to have respondent organized in Tennessee to succeed to the business of the Kentucky corporation and to enter into this contract in order to create a diversity of citizenship. The district court found there was no fraud upon its jurisdiction, held the contract valid and found, substantially as alleged in the complaint, that petitioner violated respondent's rights under it. The decree enjoins petitioner from continuing such interference.

1. Section 37 of the Judicial Code requires any suit commenced in a district court to be dismissed, if it shall appear that the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction or that the parties have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable in such court. The requisite diversity of citizenship exists. And the controversy is real and substantial. The privilege granted is valuable. Petitioner treats the contract as invalid and claims to be entitled, without the consent of the railroad company to use railroad property to park its vehicles and solicit business. The railroad company has failed to protect the rights it granted. The motives which induced the creation of respondent to become successor to its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding concerning their jurisdiction. *M'Donald* v. *Smalley et al.*, 1 Pet. 620, 624. It is enough that respondent is the real party in interest. *Smith et al.* vs. *Kernochen*, 7 How. 198, 216. The incorporation of respondent or its title to the business and contract in question is not impeached.

Coöperation between it and the railroad company to have the rights of the parties determined by a federal court was not improper or collusive within the meaning of § 37. *Re Metropolitan Railway Receivership*, 208 U. S. 90, 110. *Harkin* v. *Brundage*, 276 U. S. 36. *South Dakota* v. *North Carolina*, 192 U. S. 286, 311. It requires no discussion to distinguish *Lehigh Mining and Mfg. Co.* v. *Kelly*, 160 U. S. 327, and *Miller & Lux* v. *East Side Canal Co.*, 211 U. S. 293. The district court had jurisdiction.

2. Petitioner maintains that the contract is not enforceable because in excess of the railroad company's power under its charter, and cites the decision of the Kentucky Court of Appeals in *McConnell* v. *Pedigo*, 92 Ky. 465. That case involved a grant by the railroad company of the exclusive privilege of standing hacks at the platform of its depot in Glasgow. The court did not refer to any of the terms of the charter. But petitioner states that the railroad company was incorporated by an Act of the Legislature of Kentucky, approved March 4, 1850, and purports to quote the section relating to corporate powers. "The said Louisville and Nashville Railroad Company . . . may make all such regulations, rules and by-laws as are necessary for the government of the corporation, or for effecting the object for which it is created: *Provided*, that such regulations, rules and by-laws shall not be repugnant to the laws and constitution of said State or the United States . . . ". The opinion does not hold or suggest that the contract was contrary to any provision of the constitution or statutes of Kentucky or in violation of federal law. The court's conclusion rests on its determination of a question of general law and not upon a construction of the charter. Moreover that court has given this charter a much broader construction than that insisted on by petitioner. In *Louis-*

ville Property Co. v. *Commonwealth,* 146 Ky. 827, it held that, "In the maintenance of a place for hotel or restaurant accommodations, and for pleasure, recreation and rest, such as is afforded by a park, neither the letter nor the spirit of the Constitution or statute is violated, but the railroad company acts in the exercise of certain implied powers which it is not prohibited to exercise." So far as concerns the railroad company's charter authority to make it, the contract is clearly within the principle of that decision.

3. Section 214 of the Kentucky constitution provides that no railway company shall make any exclusive or preferential arrangement for the handling of freight "or for the conduct of any business as a common carrier." Petitioner invokes the last clause. The railroad company is under no obligation to transport passengers or baggage from its station. *McConnell* v. *Pedigo, supra,* 468. It is not bound to permit those engaged in such transportation to use its property, to solicit patronage, park their vehicles or otherwise to carry on their business. The contract does not relate to the railroad company's business as a common carrier. *D. L. & W. R. R. Co.* v. *Morristown,* 276 U. S. 182.

4. The Court of Appeals of Kentucky held such contracts invalid in *McConnell* v. *Pedigo, supra,* and *Palmer Transfer Co.* v. *Anderson,* 131 Ky. 217. Invalidity of a similar contract was assumed arguendo in *Commonwealth* v. *Louisville Transfer Co.,* 181 Ky. 305. As reasons for its conclusion that court suggests that the grant of such privileges prevents competition, makes such discrimination as is unreasonable and detrimental to the public and constitutes such a preference over other transfer men as to give grantee a practical monopoly of the business. It has not held them repugnant to any provision of the statutes or constitution of the State. The question there decided

is one of general law. *Donovan* v. *Pennsylvania Company,* 199 U. S. 279, 300. This Court holds such contracts valid. *Donovan* case, *supra,* 297. *Morristown* case, *supra.* And these decisions show that, without its consent, the property of a railroad company may not be used by taxicabmen or others to solicit or carry on their business and that it is beyond the power of the State in the public interest to require the railroad company without compensation to allow its property so to be used.

And state courts quite generally construe the common law as this Court has applied it. *Old Colony Railroad Co.* v. *Tripp,* 147 Mass. 35. *Boston & Albany Railroad* v. *Brown,* 177 Mass. 65. *New York, N. H. & H. R. Co.* v. *Scovill,* 71 Conn. 136, 145. *Griswold* v. *Webb,* 16 R. I. 649, 651. *New York, N. H. & H. R. R. Co.* v. *Bork,* 23 R. I. 218, 222. *Hedding* v. *Gallagher,* 72 N. H. 377. *Brown* v. *N. Y. C. & H. R. R. Co.,* 75 Hun. 355. 359. *Thompson's Exp. & Storage Co.* v. *Whitemore,* 88 N. J. Eq. 535. *Norfolk & Western R. Co.* v. *Old Dominion Baggage Co.,* 99 Va. 111. *Rose* v. *Public Service Commission,* 75 W. Va. 1, 5. *State* v. *Depot Co.,* 71 O. S. 379. *Railroad* v. *Kohler,* 107 Kan. 673, 677. *Railroad Co.* v. *Davidson,* 33 Utah 370. *Union Depot & Ry. Co.* v. *Meeking,* 42 Colo. 89, 95. *Dingman* v. *Duluth, etc. R. Co.,* 164 Mich. 328. *Lewis* v. *Railway Co.,* 36 Tex. Civ. App. 48, 50. See *Commonwealth* v. *Power,* 7 Metc. 596, 600. *Godbout* v. *Saint Paul Union Depot Co.,* 79 Minn. 188, 200. *Napman* v. *People,* 19 Mich. 352, 355. *Fluker* v. *Georgia Railroad & Banking Co.,* 81 Ga. 461, 463.

In harmony with the Kentucky decisions, the highest courts of Indiana and Mississippi hold such contracts invalid. *Indianapolis Union R. Co.* v. *Dohn,* 153 Ind. 10. *State* v. *Reed,* 76 Miss. 211. The same conclusion is reached in *Cravens* v. *Rodgers,* 101 Mo. 247. *Montana Union Ry. Co.* v. *Langlois,* 9 Mont. 419. *Hack & Bus Co.*

v. *Sootsma,* 84 Mich. 194. But in each of the last three cases the conclusion rests, at least in part, upon a provision of state statute or constitution.

Arrangements similar in principle to that before us are sustained in English courts. *Perth General Station Committee* v. *Ross,* L. R. App. Cas. (1897) 479. *In re Beadell,* 2 C. B. (N. S.) 509. *Barker* v. *Midland Ry. Co.,* 18 C. B. 45.

The cases cited show that the decisions of the Kentucky Court of Appeals holding such arrangements invalid are contrary to the common law as generally understood and applied. And we are of opinion that petitioner here has failed to show any valid ground for disregarding this contract and that its interference cannot be justified. Care is to be observed lest the doctrine that a contract is void as against public policy be unreasonably extended. Detriment to the public interest is not be presumed in the absence of showing that something improper is done or contemplated. *Steele* v. *Drummond,* 275 U. S. 199. And it is to be remembered, as stated by Sir George Jessel, M. R., in *Printing Company* v. *Sampson,* L. R. 19 Eq. 462, 465, that public policy requires that competent persons " shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily shall be held sacred, and shall be enforced by Courts of justice." The station grounds belong to the railroad company and it lawfully may put them into any use that does not interfere with its duties as a common carrier. The privilege granted to respondent does not impair the railroad company's service to the public or infringe any right of other taxicabmen to transport passengers to and from the station. While it gives the respondent advantage in getting business, passengers are free to engage anyone who may be ready to serve them. The carrying out of such contracts generally makes for good order at railway sta-

tions, prevents annoyance, serves convenience and promotes safety of passengers. *D. L. & W. R. R. Co.* v. *Morristown, supra.* There is here no complaint by or on behalf of passengers; no lack of service, unreasonable exaction or inconvenience of the public is shown. It would be unwarranted and arbitrary to assume that this contract is contrary to public interest. The grant of privileges to respondent creates no duty on the part of the railroad company to give like privileges to others, and therefore there is no illegal discrimination. And, as the State is without power to require any part of the depot ground to be used as a public hack stand without providing just compensation therefor, then *a fortiori* such property may not be handed over for the use of petitioner without the consent of the owner.

5. The decree below should be affirmed unless federal courts are bound by Kentucky decisions which are directly opposed to this Court's determination of the principles of common law properly to be applied in such cases. Petitioner argues that the Kentucky decisions are persuasive and establish the invalidity of such contracts and that the Circuit Court of Appeals erred in refusing to follow them. But, as we understand the brief, it does not contend that, by reason of the rule of decision declared by § 34 of the Judiciary Act of 1789 (now R. S. § 721, U. S. C. Tit. 28 § 725), this Court is required to adopt the Kentucky decisions. But, granting that this point is before us, it cannot be sustained. The contract gives respondent, subject to termination on short notice, license or privilege to solicit patronage and park its vehicles on railroad property at train time. There is no question concerning title to land. No provision of state statute or constitution and no ancient or fixed local usage is involved. For the discovery of common law principles applicable in any case, investigation is not limited to the

decisions of the courts of the State in which the controversy arises. State and federal courts go to the same sources for evidence of the existing applicable rule. The effort of both is to ascertain that rule. Kentucky has adopted the common law and her courts recognize that its principles are not local but are included in the body of law constituting the general jurisprudence prevailing wherever the common law is recognized. *Hunt* v. *Warnicke's Heirs,* 3 Hardin 61. *Lathrop* v. *Commercial Bank,* 8 Dana 114, 121. *Ray* v. *Sweeney,* 14 Bush 1, 9, *et seq.* *Aetna Insurance Co.* v. *Commonwealth,* 106 Ky. 864, 876. *Nider* v. *Commonwealth,* 140 Ky. 684, 686. And see 1 Kent's Commentaries (14th ed.) pp. 451, 602. As respects the rule of decision to be followed by federal courts, distinction has always been made between statutes of a State and the decisions of its courts on questions of general law. The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this Court. *Swift* v. *Tyson,* 16 Pet. 1, 19, was an action on a bill of exchange. Mr. Justice Story, writing for the Court, fully expounded § 34 of the Judiciary Act. *Carpenter* v. *Insurance Company,* 16 Pet. 495, 511, held that the construction of an insurance policy involves questions of general law. *Lane* v. *Vick,* 3 How. 464, involved the construction of a will. It was said (p. 476): "This court do not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes." *Foxcroft* v. *Mallett,* 4 How. 353, 379, held that the decision of a state court construing a deed is not conclusive on this Court. *Chicago City* v. *Robbins,* 2 Bl. 418, 428, declined to follow the determination of the state court as to what

constitutes negligence. *Yates* v. *Milwaukee,* 10 Wall. 497, 506, held that the determination of what constitutes a dedication of land to public use is one of general law. *Olcott* v. *Supervisors,* 16 Wall. 678, 689, held that the determination of what is a public purpose to warrant municipal taxation involves a question of general law. *Railroad Company* v. *Lockwood,* 17 Wall. 357, 366, declined to follow the state rule as to liability of common carriers for injury of passengers. *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 443, held a question concerning the validity of a contract for carriage of goods is one of general law. *Baltimore & Ohio Railroad* v. *Baugh,* 149 U. S. 368, 370, so held as to the responsibility of a railroad company to its employees for personal injuries. *Beutler* v. *Grand Trunk Railway,* 224 U. S. 85, 88, decides who are fellow-servants as a question of general law.*

The lower courts followed the well-established rule and rightly held the contract valid. The facts shown warrant the injunction granted.

Decree affirmed.

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*And see *Watson* v. *Tarpley,* 18 How., 517; *Mercer County* v. *Hackett,* 1 Wall. 83, 95; *Supervisors* v. *Schenck,* 5 Wall. 772, 784; *Boyce* v. *Tabb,* 18 Wall. 546, 548; *Railroad Co.* v. *Jones,* 95 U. S. 439; *Hough* v. *Railway Co.,* 100 U. S. 213, 226; *Oates* v. *National Bank,* 100 U. S. 239, 246; *Railroad Co.* v. *National Bank,* 102 U. S. 14, 29; *Burgess* v. *Seligman,* 107 U. S. 20, 32, *et seq.; Myrick* v. *Michigan Central R. R. Co.,* 107 U. S. 102, 109; *Pana* v. *Bowler,* 107 U. S. 529, 540; *Gibson* v. *Lyon,* 115 U. S. 439, 446; *Enfield* v. *Jordan,* 119 U. S. 680, 694; *Smith* v. *Alabama,* 124 U. S. 465, 478; *Lake Shore Railway Co.* v. *Prentice,* 147 U. S. 101, 106; *Gardner* v. *Michigan Central Railroad,* 150 U. S. 349, 358; *Oakes* v. *Mase,* 165 U. S. 363; *Barber* v. *Pittsburgh, &c., Railway,* 166 U. S. 83, 100; *Pennsylvania R. R. Co.* v. *Hughes,* 191 U. S. 477, 485–486; *Presidio County* v. *Noel-Young Co.,* 212 U. S. 58, 73; *Texas & Pacific Ry. Co.* v. *Bourman,* 212 U. S. 536, 541, and cases cited; *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 357, *et seq.; Salem Co.* v. *Manufacturers' Co.,* 264 U. S. 182, 191; *B. & O. R. R.* v. *Goodman,* 275 U. S. 66, 70.

MR. JUSTICE HOLMES, dissenting.

This is a suit brought by the respondent, The Brown and Yellow Taxicab and Transfer Company, as plaintiff, to prevent the petitioner, The Black and White Taxicab and Transfer Company, from interfering with the carrying out of a contract between the plaintiff and the other defendant, The Louisville and Nashville Railroad Company. The plaintiff is a corporation of Tennessee. It had a predecessor of the same name which was a corporation of Kentucky. Knowing that the Courts of Kentucky held contracts of the kind in question invalid and that the Courts of the United States maintained them as valid, a family that owned the Kentucky corporation procured the incorporation of the plaintiff and caused the other to be dissolved after conveying all the corporate property to the plaintiff. The new Tennessee corporation then proceeded to make with the Louisville and Nashville Railroad Company the contract above mentioned, by which the Railroad Company gave to it exclusive privileges in the station grounds, and two months later the Tennessee corporation brought this suit. The Circuit Court of Appeals, affirming a decree of the District Court, granted an injunction and upheld this contract. It expressly recognized that the decisions of the Kentucky Courts held that in Kentucky a railroad company could not grant such rights, but this being a 'question of general law' it went its own way regardless of the Courts of this State. 15 F. (2d) 509.

The Circuit Court of Appeals had so considerable a tradition behind it in deciding as it did that if I did not regard the case as exceptional I should not feel warranted in presenting my own convictions again after having stated them in *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349. But the question is important and in my opinion the prevailing doctrine has been accepted upon a subtle fallacy

that never has been analyzed. If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. Therefore I think it proper to state what I think the fallacy is.—The often repeated proposition of this and the lower Courts is that the parties are entitled to an independent judgment on matters of general law. By that phrase is meant matters that are not governed by any law of the United States or by any statute of the State—matters that in States other than Louisiana are governed in most respects by what is called the common law. It is through this phrase that what I think the fallacy comes in.

Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeals, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it

may have been in England or anywhere else. It may be adopted by statute in place of another system previously in force. *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, 345. But a general adoption of it does not prevent the State Courts from refusing to follow the English decisions upon a matter where the local conditions are different. *Wear* v. *Kansas*, 245 U. S. 154, 156, 157. It may be changed by statute, *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368, 378, as is done every day. It may be departed from deliberately by judicial decisions, as with regard to water rights, in States where the common law generally prevails. Louisiana is a living proof that it need not be adopted at all. (I do not know whether under the prevailing doctrine we should regard ourselves as authorities upon the general law of Louisiana superior to those trained in the system.) Whether and how far and in what sense a rule shall be adopted whether called common law or Kentucky law is for the State alone to decide.

If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all Courts to bow, whatever their private opinions might be. *Mason* v. *United States*, 260 U. S. 545, 555. *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 137. I see no reason why it should have less effect when it speaks by its other voice. See *Benedict* v. *Ratner*, 268 U. S. 353, *Sim* v. *Edenborn*, 242 U. S. 131. If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain. But when the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so

far as it is not interfered with by the superior power of the United States. The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says, with an authority that no one denies, except when a citizen of another State is able to invoke an exceptional jurisdiction, that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the State with equal authority however its function may be described.

Mr. Justice Story in *Swift* v. *Tyson,* 16 Peters, 1, evidently under the tacit domination of the fallacy to which I have referred, devotes some energy to showing that § 34 of the Judiciary Act of 1789, c. 20, refers only to statutes when it provides that except as excepted the laws of the several States shall be regarded as rules of decision in trials at common law in Courts of the United States. An examination of the original document by a most competent hand has shown that Mr. Justice Story probably was wrong if anyone is interested to inquire what the framers of the instrument meant. 37 Harvard Law Review, 49, at pp. 81–88. But this question is deeper than that; it is a question of the authority by which certain particular acts, here the grant of exclusive privileges in a railroad station, are governed. In my opinion the authority and only authority is the State, and if that be so, the voice adopted by the State as its own should utter the last word. I should leave *Swift* v. *Tyson* undisturbed, as I indicated in *Kuhn* v. *Fairmont Coal Co.,* but I would not allow it to spread the assumed dominion into new fields.

In view of what I have said it is not necessary for me to give subordinate and narrower reasons for my opinion that the decision below should be reversed. But there are adequate reasons short of what I think should be recognized. This is a question concerning the lawful use of land in Kentucky by a corporation chartered by Ken-

tucky. The policy of Kentucky with regard to it has been settled in Kentucky for more than thirty-five years. *McConnell* v. *Pedigo,* 92 Ky. 465. (1892.) Even under the rule that I combat, it has been recognized that a settled line of state decisions was conclusive to establish a rule of property or the public policy of the State. *Hartford Fire Insurance Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 175 U. S. 91, 100. I should have supposed that what arrangements could or could not be made for the use of a piece of land was a purely local question, on which, if on anything, the State should have its own way and the State Courts should be taken to declare what the State wills. See especially *Smith Middlings Purifier Co.* v. *McGroarty,* 136 U. S. 237, 241.

Mr. Justice Brandeis and Mr. Justice Stone concur in this opinion.

MOORE *v.* CITY OF NAMPA.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 384. Argued March 9, 1928.—Decided April 9, 1928.

Bonds issued by a city to complete a local improvement, which did not pledge the city's general credit but were expressly payable only out of certain special assessments on land of the improvement district and were therefore nonnegotiable, were bought by the plaintiff from a prior purchaser, in reliance on advice of his attorneys, on recitals in the bonds giving assurance of their validity and soundness and on a certificate issued by the mayor, clerk, and treasurer of the city, representing that no legislation was pending in respect of the creation of the improvement district, the construction of the improvement, or the issue of bonds,—which was false. In making the purchase, the attorneys had before them a transcript of the proceedings showing that the assessments were in excess of the original estimate of cost—a fact which rendered the assessments void under the state law, as was subsequently ad-

judged by the state courts in a suit by a land owner against the city, pending when the certificate was issued. The bonds were therefore worthless. *Held:*

1. That plaintiff had no cause of action against the city for negligence or misrepresentation. P. 542.

2. He was charged through the transcript when he bought the bonds with notice of the invalidating facts, and must be held to have known the law. P. 541.

3. His position was not strengthened by the fact that the city's officials also misunderstood the law, nor by the recitals reflecting their opinion as to the legal effect of the bonds. *Id.*

4. Actionable negligence cannot be predicated on the failure of the city's officers properly to exert their powers and perform their duties in respect of the estimate, assessment and contract for construction of the improvement. Such failure was not a breach of any duty owed by the city to plaintiff. *Id.*

5. The certificate was issued without legal authority by officers not empowered to define the improvement district, make the assessment, issue or sell the bonds or bind the city to pay for such improvements, nor authorized to make any statement or give any assurance in respect of such matters. *Id.*

18 F. (2d) 860, affirmed.

CERTIORARI, 275 U. S. 515, to a judgment of the Circuit Court of Appeals, which affirmed the District Court in dismissing an action against the city for negligence and false representations.

Mr. Myles P. Tallmadge, with whom *Messrs. George L. Nye* and *James H. Pershing* were on the brief, for petitioner.

The decision of the Circuit Court of Appeals is in conflict with decisions of this Court and decisions in other Circuits. *Hitchcock* v. *Galveston,* 96 U. S. 341; *State Board* v. *Citizens Street Ry. Co.,* 47 Ind. 407; *Peake* v. *New Orleans,* 139 U. S. 342; *District of Columbia* v. *Lyon,* 161 U. S. 200; *Barber Asphalt Paving Co.* v. *Harrisburg,* 64 Fed. 283; *Barber Asphalt Paving Co.* v. *Denver,* 72 Fed. 336; *Denny* v. *Spokane,* 79 Fed. 719; *McEwan* v. *Spokane,* 16 Wash. 212; *German American Savings Bank*

v. *Spokane,* 17 Wash. 315; *Mankato* v. *Barber Asphalt Co.,* 142 Fed. 329; *Bates County* v. *Wills,* 239 Fed. 785; *Oklahoma* v. *Orthwein,* 258 Fed. 190; *Gray* v. *Joliet,* 287 Ill. 280.

The Idaho statutes and decisions do not prevent the relief sought. Respondent's officers were performing corporate functions in connection with the improvements specified herein, and respondent is liable for their acts and omissions. *Oklahoma City* v. *Orthwein, supra;* Dillon, Municipal Corporations, § 827, p. 1255; *Malette* v. *Spokane,* 77 Wash. 205; *New Orleans* v. *Warner,* 175 U. S. 120; *Salt Lake City* v. *Hollister,* 118 U. S. 256.

Petitioner has no other remedy.

Messrs. D. L. Rhodes and *Leon M. Fisk* were on the brief for respondent.

Mr. Justice Butler delivered the opinion of the Court.

Petitioner sued in the United States court for the district of Idaho to recover damages alleged to have been sustained by reason of respondent's negligence and false representations in respect of certain local improvement bonds. Respondent demurred to the complaint; the district court held that it failed to state a cause of action and dismissed the case. The Circuit Court of Appeals affirmed. 18 F. (2d) 860. The petition to this Court for a writ of certiorari stated that the decision below conflicts with the decisions of this Court and of the Circuit Courts of Appeals for the Third and Eighth Circuits.* The writ was granted. 275 U. S. 515.

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* *Peake* v. *New Orleans,* 139 U. S. 342. *District of Columbia* v. *Lyon,* 161 U. S. 200. *Barber Asphalt Paving Co.* v. *City of Harrisburg,* 64 Fed. 283. *Barber Asphalt Paving Co.* v. *City of Denver,* 72 Fed. 336. *City of Mankato* v. *Barber Asphalt Paving Co.,* 142 Fed. 329. *Bates County, Mo.,* v. *Wills,* 239 Fed. 785. *Oklahoma City* v. *Orthwein,* 258 Fed. 190

Respondent created a district for the construction of a sewer to be paid for by assessments against the lands therein according to resulting benefits. The statutes require the city engineer to make estimates of the cost of such improvements; provide that no contract shall be made for any work for a price in excess of the estimate, and direct the city council to pass an ordinance defining the boundaries of the district, describing the work and showing the estimated cost. Idaho C. S. 1919, §§ 3879 and 4129. The engineer's estimate was $118,300. Assessments were made for that amount; and, pursuant to ordinance adopted December 6, 1920, bonds for $117,000 were issued. The validity of these is not questioned. It was found that the estimate was too low, and an ordinance was passed stating that the assessments first made were not sufficient to pay the cost and expenses of the work. Additional assessments amounting to $49,500 were made; and, pursuant to ordinance of January 10, 1921, respondent executed and, on March 8, 1921, delivered to a purchaser additional bonds for $43,000. On that day the mayor, clerk and treasurer of respondent issued a certificate under its seal stating that no litigation was pending or threatened in respect of the creation of the district, the construction of the sewer or the issue of the bonds.

A transcript of the proceedings and that certificate were submitted to the attorneys, who are acting for petitioner in this case, for examination as to the validity of the bonds. And they, it is alleged, relying upon the recitals in the bonds and the statements in the certificate, gave a written opinion that the bonds were valid. The complaint alleges that on July 13, 1921, petitioner, relying upon such recitals, certificate and opinion, purchased three of these bonds. And petitioner says that the statement in the certificate was material because no suit to enjoin the making of special assessments or to set them aside may be brought after the expiration of thirty days from

the making of the assessment. § 4137, C. S. 1919. The certificate was false. One Lucas, an owner of property in the district, had brought suit against the city and its officers to have the assessments in excess of the engineer's estimate declared illegal and to enjoin their collection. The trial court granted the relief sought; the Supreme Court held that the city was limited and bound by the original estimate and affirmed the judgment. 41 Idaho 35. Petitioner avers that under this decision his bonds are worthless.

He insists that respondent was negligent in failing to have a proper estimate and valid assessments made and in causing the false certificate to be issued, and that the damages claimed were caused by the negligence and misrepresentation. The suit is for tort. The demurrer was rightly sustained, unless the complaint shows that a breach by respondent of some duty it owed petitioner caused the damage claimed.

Each bond states that respondent acknowledges itself to be indebted and promises to pay bearer the sum stated; it contains recitals to the effect that all the things by law required in respect of the creation of the district, the construction of the sewer and the issue of the bond in order to make it a valid obligation of the city have been done. It states that the total cost of the work has been assessed and that the assessments are liens upon the land; that provision has been made for, and the city guarantees, the collection of assessments sufficient to pay accruing interest and principal at maturity. But, as required by statute, each bond declares that the holder shall have no claim against the city except for the collection of the assessments; that his remedy in case of non-payment shall be confined to their enforcement, and that the interest and principal shall be payable out of that fund and not otherwise. The bonds are not negotiable. *United States Mortgage Co.* v. *Sperry,* 138 U. S. 313, 343. It is clear

that respondent's faith or credit is not pledged and that the value of the bond depends upon the validity and worth of the assessments. The transcript furnished the examining attorneys showed that the engineer's estimate was too low and that the bonds in question were based on assessments in excess of that amount. Petitioner treats the transcript and false certificate as if furnished to him. He is charged, as of the time he bought the bonds, with notice of the invalidating facts and is held to have known the law. His position is not strengthened by the fact that respondent's officers, as well as the examining attorneys, were mistaken as to the validity of the additional assessments and subsequent proceedings. Recitals that merely reflect opinion as to the legal effect of the bonds or of the statements therein are not actionable and furnish no support for petitioner's claim.

The bonds were void, as held in the *Lucas* case, because issued upon assessments made in excess of the engineer's estimate. On the facts disclosed by the complaint, actionable negligence cannot be predicated on the failure of respondent's officers properly to exert their powers and perform their duties in respect of the estimate, assessment and contract for construction of the sewer. Such failure was not a breach of duty owed by respondent to petitioner. He had no relation to the matter until long after the bonds had been issued and sold to another. The facts showing their invalidity were disclosed by the transcript and known to the attorneys on whom he relied long before he purchased them. The complaint is not grounded on anything subsequently occurring.

It remains to be considered whether petitioner may recover by reason of the certificate issued March 8, 1921, falsely stating that there was no suit in respect of the creation of the district, the construction of the sewer or the issue of the bonds. No law required or authorized the making of any certificate. The statutes do not contem-

plate any such statement. It is not a part of or material to the prescribed proceedings. The city council is the governing body of the city, but it did not make or authorize the statement. The officers who signed the certificate were not authorized to define the improvement district, make the assessment, issue or sell the bonds or to bind the respondent to pay for such improvements. It cannot reasonably be said that they are impliedly authorized to make any statement or give assurance in respect of such matters.

This action is not based on contract. Recovery is not claimed on the ground that respondent was empowered to pay for the work out of funds belonging to it or upon any promise that it would do so. As no actionable negligence or misrepresentation is shown, the lower courts rightly held that no cause of action is stated in the complaint. We find no conflict between the decision of the Circuit Court of Appeals in this case and the decisions referred to in the petition for this writ.

Judgment affirmed.

DANCIGER AND EMERICH OIL COMPANY *v.* SMITH.

CERTIORARI TO THE COURT OF CIVIL APPEALS, FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS.

No. 224. Argued February 27, 1928.—Decided April 9, 1928.

1. An adjudication in bankruptcy, until followed by the appointment of a trustee, does not divest the bankrupt's title to a cause of action against a third person or prevent him from instituting or maintaining suit thereon. P. 545.
2. S assigned to some of his creditors, as security, a claim on which he had begun suit; agreed to prosecute the suit for their account and, more than four months thereafter, began voluntary bankruptcy proceedings in which no trustee was appointed and in which he concealed the claim and was discharged. *Held* that the

question whether the assignment was void as to his other creditors could not be raised by the defendants against the prosecution of the suit by the bankrupt. P. 547.

286 S. W. 633, affirmed.

CERTIORARI, 274 U. S. 733, to a judgment of the Court of Civil Appeals of Texas, affirming a judgment recovered by the respondent after his discharge in voluntary bankruptcy proceedings, in an action brought by him more than four months before his petition in bankruptcy was filed.

Mr. I. J. Ringolsky, with whom *Messrs. Charles L. Black* and *T. F. Hunter* were on the brief, for petitioner.

The Texas statute required an assignment of a chose in action to be in writing, acknowledged and filed in order to be valid as against persons subsequently dealing with reference to it. This section was not complied with as to either assignment. Consequently, these assignments were, under the provisions of the Bankruptcy Act, void as against a trustee in bankruptcy, and this chose in action was as much a part of respondent's estate in bankruptcy as though the assignments never existed.

The assignments being given as security, even if valid as against a trustee in bankruptcy or creditors, did not prevent the chose in action from being a part of respondent's estate in bankruptcy.

Under *First Nat'l Bank* v. *Lasatar,* 196 U. S. 115, respondent cannot, by withholding knowledge of the existence of this chose in action from the bankruptcy court and his creditors, and thus preventing a trustee from being appointed, now assert title to the concealed asset either for himself or for the benefit of a favored creditor. He cannot be permitted to profit by his own fraud, and to permit him to do so would be a fraud on the bankruptcy court.

The filing of a petition in bankruptcy is a caveat and has the effect of an injunction and attachment on all property of respondent. From that moment, all his property is *in custodia legis*, in the exclusive jurisdiction of the bankruptcy court. Pending the appointment of a trustee, the law holds the property to abide the decision of the court as effectively as if an attachment had issued. This being true, respondent cannot be permitted to exercise ownership and possession over the assets of the estate for the benefit of himself or a favored creditor. That he might be permitted in the interim to maintain a suit for the protection of the estate and all his creditors is an entirely different question.

The title of the trustee relates back to the date of the filing of the petition; the estate can be re-opened at any time to administer concealed assets; the only express provision in the Bankruptcy Act for the re-vesting of title in a bankrupt is by the confirmation of a composition.

Litigants are not permitted to obtain the judgments and orders of courts upon certain representations and then, when it is to their convenience or profit, repudiate such representations and obtain the judgments and orders of another court on a directly opposite state of facts concerning the same matter.

Messrs. Jed C. Adams and *W. B. Harrell* submitted for the respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This suit was brought by Smith in the district court for Dallas County, Texas, to recover brokerage commissions claimed to be due him from Danciger and the Emerich Oil Co. He assigned part of this claim to his attorneys; and later assigned the remainder to two of his creditors as security for antecedent debts, agreeing to prosecute the suit in his name and account to them for the proceeds.

More than four months thereafter he filed a voluntary petition in bankruptcy. He did not mention this claim in the schedules, and stated that he had no assets and that none of his property had been assigned for the benefit of creditors. He was thereupon adjudicated a bankrupt. No trustee was appointed for his estate; and he was granted a discharge.

At the trial of the suit the defendants, in addition to their defenses on the merits, relied upon the defense, appropriately pleaded, that by reason of the proceeding in bankruptcy Smith had ceased to be the owner of the cause of action and was not entitled to prosecute the suit. This contention was overruled, and Smith recovered judgment. This was affirmed by the Court of Civil Appeals, 286 S. W. 633; and an application to the Supreme Court for a writ of error was denied, 116 Tex. 269.

The petitioners contend that by permitting Smith to continue the prosecution of the suit after his adjudication in bankruptcy they were deprived of a right, privilege and immunity under the Bankruptcy Act.[1]

The Act provides, with certain exceptions not here material, that a trustee of the estate of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all non-exempt property, including rights of action, § 70; and that the trustee may, with the approval of the court, be permitted to prosecute any suit commenced by the bankrupt prior to the adjudication, § 11c.

It is clear that under these provisions an adjudication in bankruptcy, until followed by the appointment of a trustee, does not divest the bankrupt's title to a cause of action against a third person or prevent him from instituting or maintaining suit thereon. Thus, he may insti-

[1] 30 Stat 544, c. 541; U. S. C., Tit. 11.

tute and maintain such a suit before the election of a trustee. *Johnson* v. *Collier*, 222 U. S. 538, 539; *Christapherson* v. *Harrington*, 118 Minn. 42, 45. Or, if no trustee is appointed. *Rand* v. *Iowa Cent. Ry.*, 186 N. Y. 58, 60; *Griffin* v. *Mutual Life Ins. Co.*, 119 Ga. 664, 665, in which the opinion was delivered by Judge Lamar, later a member of this Court. And see *Fuller* v. *New York Fire Ins. Co.*, 184 Mass. 12, 16; *Gordon* v. *Mechanics' & Trader's Ins. Co.*, 120 La. 442, 443; and *Schoenthaler* v. *Rosskam*, 107 Ill. App. 427, 436. In *Johnson* v. *Collier*, *supra*, this Court said: "While for many purposes the filing of the petition operates in the nature of an attachment upon choses in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes 'vested by operation of law with the title of the bankrupt' as of the date of adjudication. . . . Until such election the bankrupt has title—defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. . . . During that period it may frequently be important that action should be . . . taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court in his own name, the one previously brought can be abated. If, however, he is of opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt. . . . If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the

suggestion that this might involve a liability to pay both the bankrupt and the trustee."

It follows that Smith's title to the right of action was not divested by the proceeding in bankruptcy, no trustee having been appointed to whom it could pass; and that the Bankruptcy Act did not prevent him from subsequently prosecuting the suit to judgment.

The doctrine of *First National Bank* v. *Lasater,* 196 U. S. 115, 119, on which the petitioners rely—that a bankrupt who omits to schedule and withholds all knowledge of a valuable claim, cannot, after obtaining a discharge from his debts, assert title to such claim and maintain a suit thereon in his own right—has no application here; for in that case a trustee had been appointed to whom the right of action had passed.

No other Federal question is presented by the record. If, as urged by the petitioners, the assignments made by Smith were void as against his other creditors—who were not before the court—any question that may arise as to whether he holds the judgment for the benefit of his assignees or of his general creditors, may be determined in appropriate proceedings taken for that purpose. See *Griffin* v. *Mutual Life Insurance Co., supra,* 655. In any event the petitioners were not prejudiced.

Judgment affirmed.

CITY OF NEW BRUNSWICK ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 260. Argued March 2, 1928.—Decided April 9, 1928.

1. Land acquired by the United States Housing Corporation under the Act of 1918 and by the Act of 1919 directed to be sold with reservation of a first lien for unpaid purchase money, was not

subject to state taxation so long as the Corporation held title as an instrumentality of the United States. P. 555.

2. Purchasers of such land, by making the payments entitling them, under their contracts with the Corporation, to receive deeds subject to their obligation to execute mortgages to secure deferred payments, became the equitable owners, and the taxability of the land, as respects the Corporation, is to be determined as if both the deeds and the mortgages had been executed. *Id.*
3. In this situation, a city where the land is, the state law permitting, may tax the purchasers upon the entire value of the land and enforce collection by selling their interests; but it cannot sell for such taxes the interest retained by the Corporation for the benefit of the United States, as security for unpaid purchase money. *Id.*

11 F. (2d) 476, reversed.

CERTIORARI, 275 U. S. 511, to a decree of the Circuit Court of Appeals, which reversed a decree of the District Court, 1 F. (2d) 741, denying an injunction to restrain sales of lots for city taxes. The suit was brought by the United States Housing Corporation, and joined in by the United States, against the city. The court below directed that the assessments for certain years be canceled and that sales for enforcement of the taxes be enjoined.

Mr. John W. Davis, with whom *Messrs. Thomas H. Hagerty, Russell E. Watson,* and *Edward L. Patterson* were on the brief, for petitioners.

The effect of the contracts was to render the property fully taxable by state authorities to the purchasers as soon as the purchasers became entitled to their deeds. It is a well recognized principle that one entitled to a conveyance of real estate, is in equity the real owner. *Carroll* v. *Safford,* 3 How. 441; *Green* v. *Smith,* 1 Atkyns, 572; *Farrar* v. *Earl of Winterton,* 5 Beav. 1; Bispham Equity, 7th ed., § 364, p. 534; Pomeroy, Eq. Juris., 4th ed., §§ 105, 368, 372, 1406; *Hoagland* v. *Latourette,* 2 N. J. Eq. 254; *Huffman* v. *Hummer,* 17 *Id.* 264; *King* v. *Ruckman,* 21 *Id.* 599; *Haughwout* v. *Murphy,* 22 *Id.* 531.

One with the right to receive legal title to property from the United States, and not excluded from its enjoyment, is to be treated as the beneficial owner and the land subject to taxation as his property. *Wisconsin Central R. R. Co.* v. *Price County,* 133 U. S. 496; *Wilson Cypress Co.* v. *Del Pozo y Marcos,* 236 U. S. 635; *Carroll* v. *Safford,* 3 How. 441; *Northern Pacific R. R.* v. *Patterson,* 154 U. S. 130; *Bothwell* v. *Bingham County,* 237 U. S. 642; *Kansas-Pacific Ry. Co.* v. *Prescott,* 16 Wall. 603; *Irwin* v. *Wright,* 258 U. S. 219.

It has never been suggested hitherto that the mere giving of a mortgage to an agency of the United States would be sufficient to exempt the mortgaged property from taxation. And under the law of New Jersey, the mortgagee would receive no present interest. *Blue* v. *Everett,* 56 N. J. Eq. 455.

A mere right in the United States to acquire property on the breach of a condition subsequent to the passage of title, will not exempt such property from taxation. *Railway Co.* v. *McShane,* 22 Wall. 444; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 381.

Moreover the provisions of the contract as to the title and mortgage indicate that it was the intention of the parties that the land should be taxable.

The passage of title is the criterion of taxability. *Wisconsin Ry. Co.* v. *Price County,* 133 U. S. 496; *Irwin* v. *Wright,* 258 U. S. 219; *Bothwell* v. *Bingham County,* 237 U. S. 642; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375.

It was the purpose of Congress to dispose of this property as soon as possible. Full power is given by the Act to sell on the terms agreed upon, which terms are to be conclusive as to the transfer of title.

By "reserving a first lien" Congress meant that the United States should receive no more than the usual first

lien with all the incidents thereof. The first lien created by a mortgage cannot be more than a prior interest in the property at the time it is created. In certain circumstances, it may become subordinate to statutory liens such as tax liens; Cooley on Taxation, 4th ed., § 1240; or liens for certain supplies; *Virginia Development Co.* v. *Iron Co.*, 90 Va. 126; *Fidelity Ins. Co.* v. *Roanoke Iron Co.*, 81 Fed. 439; or mechanics liens; Jones on Liens, c. XXXVI. The exact effect and priority of all these depend on the various statutes in the different jurisdictions; Pomeroy Eq. Juris. 4th ed., §§ 1268, 1269; and the power to create such priority has been recognized in *Provident Institution* v. *Mayor of Jersey City*, 113 U. S. 506.

The statute itself provides that the lien shall depend on the contract and not on the statute. *United States* v. *Ansonia Brass Co.*, 218 U. S. 452.

The construction that the petitioners contend for alone achieves substantial justice. *Tucker* v. *Ferguson*, 22 Wall. 527; *Winona Land Co.* v. *Minnesota*, 159 U. S. 526.

Assuming without conceding that the United States has retained a lien that is prior to all others, the property may nevertheless be assessed to the purchasers and sold to enforce such assessment, subject always to that priority. The City's action in assessing and enforcing the taxes against the purchasers, subject to the prior lien of the United States, cannot prejudice the latter's rights in any way.

Where legal title has passed to a purchaser and where there is a right of the United States as to the property that continues to be prior to any other, taxes may be levied and enforced on the property against the purchaser, subject to that priority. *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375; *United States* v. *Canyon County*, 232 Fed. 985; *Irwin* v. *Wright*, 258 U. S. 219; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Railway Co.* v. *McShane*, 22 Wall. 444.

The wrongful refusal of the United States to convey legal title cannot be used to enable the purchasers to avoid such taxation.

Even if it be held that the land itself is exempt from both conditional and unconditional taxation to the purchasers, nevertheless it is within the power of the State to provide for the taxation of whatever equitable interest the purchasers may hold.

Solicitor General Mitchell, with whom *Mr. Thomas W. O'Brien,* Counsel, United States Housing Corporation, was on the brief, for respondents.

Decisions of this Court in cases where the United States held the naked legal title in trust for a purchaser, or where land in the public domain has been held immune from state taxation before the purchaser has a right to a deed, are not pertinent.

Until the full purchase price is paid, the United States has an interest in these lands for the enforcement of which certain remedies are available to it. Without regard to any other statutes or rules relating to priority, the statute authorizing sales by the Housing Corporation discloses a purpose to make the lien and rights of the United States in this land superior to those of any State or individual.

The taxes levied by the State are on the land and not on the interest of the purchaser, and the tax sales under state law, if valid, would convey the land and extinguish the lien and rights of the United States. The state law makes no provision for selling the interest of the purchaser, nor for making tax sales subject to the rights of the United States.

A decree not adjudging the taxes entirely void, but determining them inferior to the rights of the United States, and requiring the City, in making tax sales and issuing deeds, to state that they are subject to the rights of the United States, would amount to writing a new

tax law for the State of New Jersey. Taking the state tax laws as they stand, the logical conclusion may be that the taxes are void, but at least the United States is entitled to have the decree provide that its rights are superior. The matter of reaching by taxation a taxable interest as distinguished from taxing the land itself, has been dealt with in the following cases: *Northern Pacific Ry. Co.* v. *Myers,* 172 U. S. 589; *Irwin* v. *Wright,* 258 U. S. 219; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375.

Mr. Justice Sanford delivered the opinion of the Court.

The question here relates to the validity of certain taxes assessed by the City of New Brunswick, New Jersey, upon real estate to which the United States Housing Corporation held the legal title.

The Housing Corporation was organized by authority of the President, pursuant to an Act of May, 1918,[1] for the purpose of providing housing for employees of the United States and workers engaged in industries connected with the national defense during the late war; for which an appropriation was made. The entire capital stock of the Corporation is held for and on behalf of the United States. For the purpose stated the Corporation purchased in 1918 a tract of land in New Brunswick, subdivided it into lots, and erected houses upon them.

By an amendment of July, 1919,[2] providing for winding up its affairs, the Corporation was authorized and directed to sell and convey all its property remaining undisposed of after the termination of the war, "*Provided, however,* That no sale or conveyance shall be made hereunder on credit without reserving a first lien on such property for

[1] 40 Stat. 550, c. 74; as amended, 40 Stat. 594, c. 92.

[2] 41 Stat. 163, 224, c. 24.

the unpaid purchase money." Pursuant thereto the Corporation entered into contracts for the sale of the New Brunswick lots to various purchasers. Each contract provided that the Corporation should sell and the purchaser should buy the property at a stipulated price, to be paid in instalments, the first on the execution of the contract, and the remainder in equal monthly payments, with interest; that after the purchaser had paid ten per cent of the purchase price the Corporation should execute and deliver a special warranty deed for the property and the purchaser should execute and deliver a note or notes with mortgage on the property to secure the balance of the purchase price in accordance with the terms of the contract; that taxes should be apportioned as of the date of the contract, and all thereafter becoming due should be paid by the purchaser, and if he failed so to do and they were paid by the Corporation, the amount thereof should be added to the purchase price; and that if the purchaser defaulted for thirty days in the performance of the terms of the contract the Corporation might retain all payments made thereon as liquidated damages, and the purchaser should be relieved from any further obligation under the contract.

The purchasers entered upon and took possession of the lots upon the execution of their respective contracts. Either then or later each paid the Corporation the entire percentage of the purchase price which entitled him under the terms of his contract to receive a deed. Nearly all of such payments were made prior to October 1, 1920. But because the City had meanwhile assessed certain taxes on these properties, which remained unpaid, the Corporation refused to execute deeds to the purchasers; and they, consequently, did not execute notes and mortgages for the balance of the purchase price.

While the Corporation thus continued to hold the legal title to the lots the City assessed them for taxation to the

purchasers for the years 1920 to 1923, inclusive. These taxes were not paid. And thereupon, to prevent threatened tax sales, the Corporation brought this suit, in which the United States joined as a plaintiff, in the federal court for New Jersey, to have the assessments cancelled and sales for the collection of the taxes enjoined. None of the purchasers were parties to this suit.[3]

The District Court held that the assessment for the year 1920 was invalid, but, being of opinion that the equitable title had passed to the purchasers under their contracts in such manner as to render the lots taxable as their property after the dates on which they had become entitled to their deeds, sustained the validity of the assessments for the year 1921 and subsequent years on all lots for which the purchasers had become entitled to deeds prior to the date of the assessment, and denied an injunction to restrain the sales. 1 F. (2d) 741. On appeal, the Circuit Court of Appeals, being of opinion that the assessment of taxes to the purchasers for 1920 and subsequent years, while the legal title to the lots was still in the Corporation, was invalid, reversed the decree of the District Court and directed it to cancel the assessment for such years[4] and enjoin the sale of the lots for the enforcement of the taxes so assessed. 11 F. (2d) 476.

The City concedes here that the assessments made to the purchasers for the year 1920 were invalid under the New Jersey law;[5] and the question before us relates only to the taxes for 1921 and subsequent years.

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[3] Certain taxes that had been previously assessed to the Corporation itself for the years 1918 and 1919 were also challenged by the bill, but at the hearing the City conceded their invalidity, and the disposition made of them by the District Court is not here in question.

[4] Including the years 1924 to 1927, inclusive, for which taxes had meanwhile been assessed. Certain specific lots were excepted, as to which no question is raised here.

[5] This required the assessments for 1920 to be based on the ownership of the property on October 1 of the preceding year, at which time no sale contract had been made by the Corporation.

It is unquestioned that so long as the Corporation held title to the lots as an instrumentality of the United States and solely for its use and benefit, they were not subject to taxation by the City. *Clallam* v. *United States*, 263 U. S. 341, 344. But after the purchasers had made the payments entitling them to receive deeds to the lots, the Corporation ceased to hold title solely for the United States, and held partly for the purchasers, who had become the equitable owners of the property and entitled to conveyance of the title subject to their obligation to execute mortgages securing the payment of the balance of the purchase price. In equity the situation was then the same as if the Corporation had conveyed title to the purchasers, as owners, and they had mortgaged the lots to the Corporation to secure the unpaid purchase money. As between the Corporation and the City, the taxability of the lots is to be determined as if both the deeds and the mortgages had been executed; that is, as if the Corporation, while conveying the legal title to the purchasers, had retained a mortgage lien to secure the balance of the purchase price.

By the specific provision of the Act of 1919, the Corporation was not authorized to convey the property "without reserving a first lien . . . for the unpaid purchase money"; and the contracts of sale could not waive, and did not purport to waive, this lien or subordinate it to taxes.

Under the provisions of the New Jersey law the taxes assessed to the purchasers, as equitable owners, rest upon the entire lots, including not only the interests of the purchasers as equitable owners, but the interest of the Corporation retained and held as security for the payment of the unpaid purchase moneys; no distinction being made under that law between the interest of the owners and that of mortgagees or lienors. We see no reason, however, if the New Jersey law permits, why the

City may not assess taxes against the purchasers upon the entire value of the lots and enforce collection thereof by sale of their interests in the property. With that the Corporation and the United States have no concern. But it is plain, under the doctrine of the *Clallam* case, that the City is without authority to enforce the collection of the taxes thus assessed against the purchasers by a sale of the interest in the lots which was retained and held by the Corporation as security for the payment of the unpaid purchase money, whether as an incident to the retention of the legal title or as a reserved lien or as a contract right to mortgages. That interest, being held by the Corporation for the benefit of the United States, is paramount to the taxing power of the State and cannot be subjected by the City to sale for taxes.

We conclude that, although the City should not be enjoined from collecting the taxes assessed to the purchasers by sales of their interests in the lots, as equitable owners, it should be enjoined from selling the lots for the collection of such taxes unless all rights, liens and interests in the lots, retained and held by the Corporation as security for the unpaid purchase moneys, are expressly excluded from such sales, and they are made, by express terms, subject to all such prior rights, liens and interests. This, we think, will meet the equities of the case as between the Corporation and the City, and fully protect the paramount right of the United States.

The decree is reversed; and the cause will be remanded to the District Court with instructions to enter a decree in accordance with this opinion.

Decree reversed.

MR. JUSTICE MCREYNOLDS is of opinion that the District Court reached the proper conclusion and that its decree should be affirmed.

NEW MEXICO *v.* TEXAS.

IN EQUITY. ON PETITION FOR REHEARING.

No. 2, Original. Decided April 9, 1928.

Correction of the opinion delivered in this case December 5, 1927.

The corrections specified by the following memorandum are embodied in the original opinion as printed in 275 U. S. 279.

Mr. J. Harry Covington submitted the petition for rehearing, on behalf of the complainant.

Mr. W. A. Keeling, Attorney General of Texas, with whom *Messrs. John C. Wall, Wallace Hawkins,* Assistant Attorneys General, and *W. W. Turney* were on the briefs, for defendant.

Memorandum opinion by MR. JUSTICE SANFORD.

A petition for rehearing has been presented by the State of New Mexico, which we think must be denied. But it points to an error in our opinion announced December 5, 1927, which, while not affecting the ultimate decision, requires correction. The petition invites special attention to some evidence which shows that the statements made in the opinion to the effect that the State of Texas and the United States had prior to 1912 recognized and acquiesced in the line of the Rio Grande River as it was located in 1850, as the boundary between the Territory of New Mexico and Texas, without reference to subsequent changes by accretion, are not accurate, and, with the observations based on them, should be recalled. The order will be that the fifth paragraph of that portion of the opinion under the heading "Accretions" and the

first part of the next paragraph down to and including the words "in its own Constitution," be stricken from the opinion, and the following substituted:

New Mexico, when admitted as a State in 1912, explicitly declared in its Constitution that its boundary ran "along said thirty-second parallel to the Rio Grande . . . as it existed on the ninth day of September, one thousand eight hundred and fifty; thence, *following the main channel of said river, as it existed on the ninth day of September, one thousand eight hundred and fifty,* to the parallel of thirty-one degrees, forty-seven minutes north latitude." This was confirmed by the United States by admitting New Mexico as a State with the line thus described as its boundary; and Texas has also affirmed the same by its pleadings in this cause.

Opinion modified; rehearing denied.

NEW MEXICO *v.* TEXAS.

IN EQUITY.

No. 2, Original. Decree entered April 9, 1928.

Decree overruling the exceptions of New Mexico to the master's report and sustaining those of Texas; dismissing the bill and sustaining the cross bill; declaring the boundary between the two States at the place in question; appointing a commission to run, locate and mark it as so defined, subject to the approval of the Court; with other incidental provisions touching the qualification of the Commissioner, his work, his report, exceptions thereto, costs, etc.

For the opinions in this case, see 275 U. S. 279, and p. 557 of this volume.

Announced by MR. JUSTICE SANFORD.

This cause having been heard and submitted upon the pleadings, the report of the special master and the ex-

ceptions thereto, and the Court having considered the same and announced its conclusions in an opinion of December 5, 1927, this day modified in certain respects, it is ordered, adjudged and decreed as follows:

1. The exceptions of the State of New Mexico to the master's report are overruled, and the exceptions of the State of Texas are sustained.

2. The bill of the State of New Mexico is dimissed, and the cross-bill of the State of Texas sustained.

3. The true boundary between the State of New Mexico and the State of Texas in the valley of the Rio Grande River, extending southwardly from the parallel of 32 degrees north latitude to the parallel of 31 degrees 47 minutes on the international boundary between the United States of America and the United States of Mexico, is the middle of the channel of the Rio Grande River as it existed on the 9th day of September, 1850, as outlined by the special master in Section V(1) of his report; the intersection of the east bank of the river with the line of the 32nd parallel to be taken at a point 600 feet west from the Clark Monument No. 1 as re-established by the Scott-Cockrell Commission, and the middle line of the channel to be taken 150 feet from the east and west banks of the river, respectively, as found by the special master.

4. Samuel S. Gannett, geodetic and astronomic engineer, is designated as commissioner to run, locate and mark the boundary between the two States as determined by this decree. In ascertaining and locating the line of said boundary, the commissioner shall use the most accurate method now known to science and applicable in that locality; and he shall mark the boundary, as thus ascertained, by establishing permanent monuments thereon, suitably marked and at appropriate distances.

5. The commissioner shall include in his report a description of the monuments so established and of their locations. And he shall file with his report the field notes

of his survey, showing the method used by him in ascertaining and locating the line of the boundary, and a map showing the boundary line as run and marked by him; also ten copies of his report and map.

6. Before entering upon his work the commissioner shall take and subscribe his oath to perform his duties faithfully and impartially. He shall prosecute the work with diligence and dispatch, and shall have authority to employ such assistants as may be needed therein; and he shall include in his report a statement of the work done, the time employed and the expenses incurred.

7. The work of the commissioner shall be subject in all its parts to the approval of the Court. One copy each of the commissioner's report and map shall be promptly transmitted by the clerk to the Governors of the two States; and exceptions or objections to the commissioner's report, if there be such, shall be presented to the Court, or, if it be not in session, filed with the clerk, within forty days after the report is filed.

8. If, for any reason, there occurs a vacancy in the commission when the Court is not in session, the same may be filled by the designation of a new commissioner by the Chief Justice.

9. All the costs of the cause not heretofore adjudged, including the compensation and expenses of the commissioner, shall be borne in equal parts by the two States.

WORK, SECRETARY OF THE INTERIOR, *v.* BRAFFET, ADMINISTRATOR.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 344. Argued March 8, 1928.—Decided April 9, 1928.

1. Under Rev. Stats. § 2347, and Rule I of the Regulations of the Land Department of March 6, 1903, an application to purchase coal

lands within a previously surveyed school section conferred upon the applicant merely the status of a contestant endeavoring to overcome the presumptive title of the State upon the ground (in this case) that the mineral character of the land was known before the school grant attached. P. 565.

2. This amounted to no more than a privilege of seeking to restore the land applied for to the public domain; and success in the contest would not have brought the contestant a preferential right of entry, there being no statute or regulation securing him such a preference. *Id.*

3. Such a privilege was subject to withdrawal by the United States pending the contest, and was withdrawn by the Act of February 25, 1920, which provides that coal lands shall be disposed of only by lease, excepting only (§ 37), "valid claims existent at the date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws," etc. *Id.*

4. The exception in the Leasing Act, above quoted, embraces only such substantial claims as would on compliance with the provisions of the former law, ripen into ownership. P. 566.

57 App. D. C. 192, reversed.

CERTIORARI, 275 U. S. 514, to a judgment of the Court of Appeals of the District of Columbia, sustaining a mandamus to the Secretary of the Interior, directing him to issue a patent for coal lands applied for by the present respondent, upon payment of the purchase price.

Solicitor General Mitchell, with whom *Messrs. E. O. Patterson,* Solicitor, Department of the Interior, and *O. H. Graves,* Assistant to the Solicitor, were on the brief, for petitioner.

Mr. Walter Edmund Burke for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent's intestate brought suit in the Supreme Court of the District of Columbia for a mandatory injunction compelling the Secretary of the Interior to vacate his decision rejecting an application under R. S. § 2347 for the purchase of certain coal lands included in

the school-land grant to Utah, and directing that a patent issue. The case was heard on bill and answer from which it appears that the land in question, is part of section 32 in a particular township in Utah. Section 32 of each township was included in the school-land grant to the state of Utah under the Enabling Act of July 16, 1894, c. 138, 28 Stat. 107, 109, which became effective on the admission of Utah into the Union January 4, 1896. But the grant did not include any land that was known to be mineral. *United States* v. *Sweet,* 245 U. S. 563. In the official government survey the land in question was reported by the surveyor as non-mineral. In May, 1902, the state sold the lands and the purchaser later conveyed them to the Pleasant Valley Coal Company which has since appeared as the record owner and paid taxes on them. On February 4, 1918, Braffet, respondent's intestate, filed in the local land office at Salt Lake City his application to purchase the lands as coal lands. At this time and for many years before, the settled practice of the Land Office, under Rule 1 of the Regulations of March 6, 1903, 32 L. D. 39, had been to treat applications for purchase, under the mining laws, of parts of a section designated in the school-land grant, where made after the date when the grant would attach if the land was non-mineral, as a contest of the state's right.

Braffet's application was so treated. The state was cited and answered, protesting the application and setting up that the lands were not known coal lands on the date of the grant to it. The coal company intervened and made like answer. Braffet assumed the burden of the contest and offered evidence. At the conclusion of his case motions of the state and the coal company to dismiss were granted without the submission of testimony in their behalf. Braffet appealed to the Commissioner of the General Land Office, who reversed the action of the local land office and without affording the state or the

coal company opportunity to offer evidence, directed that Braffet's contest be sustained and the protest of the state dismissed. The state and the coal company appealed to the Secretary who, July 31, 1922, held that the local office had erred in dismissing the contest for insufficiency of evidence, and that the Commissioner had also erred in disposing of the case without affording the state and the coal company an opportunity to offer evidence. He remanded the cause to the local office to proceed with the contest. 49 L. D. 212.

In the meantime the Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 438, 451, had been enacted, authorizing the disposition of certain classes of mineral lands of the United States, including coal lands, by the Secretary of the Interior only by lease. Acting under this statute the Secretary, on June 4, 1923, executed a lease of the land to the coal company which, in contemplation of this action, had waived its claim under the state grant, expressly stipulating that its waiver was on condition that the lease be granted. The state in the meantime had withdrawn its protest to Braffet's application, without prejudice to the claim of the company, setting up that it had no beneficial interest in the land, by reason of its own conveyance to the coal company's grantor.

Braffet's contest was dismissed January 8, 1924, and his application to reopen it was denied on March 24, 1924. Later, the present suit was brought. The decree of the Supreme Court of the District directed the Secretary to vacate his decision remanding the proceedings to the local office, and to issue a patent on payment of the purchase price. The Court of Appeals modified the judgment in respects not now material, but held that Braffet's application was valid and that the Secretary should be directed to issue a patent. 57 App. D. C. 192.

The principal question presented is whether, by the application to purchase and by bringing and conducting the

contest, Braffet acquired rights which could not be or were not extinguished by the action taken by the Secretary under the Leasing Act. In giving an affirmative answer the Court of Appeals thought that as the Secretary had ruled that Braffet had made a prima facie case before the Department, the abandonment by the State and the coal company of the protest and their assent that the mineral lease be given were equivalent to the allowance of his claim, and that the Secretary under the Leasing Act was without power to defeat the claim since it had then ripened into a vested right.

After the Leasing Act, coal lands of the United States were subject to disposition by the Secretary only by lease "except [under § 37] as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Braffet's application was for the purchase of coal lands and not for a lease. It was not entitled to consideration under the Leasing Act unless saved by the exception as a "valid claim" existent at the date of the Act.

R. S. § 2347, under which the application was made gives the "right to enter . . . vacant coal lands of the United States not otherwise appropriated or reserved by competent authority." The departmental Regulations of March 6, 1903, 32 L. D. 39, withdrew school lands from entry with direction to local officers to treat applications for them in the same manner as contests. Rule 1 reads:

"When a school section is identified by the government survey and no claim is at the date when the right of the State would attach, if at all, asserted thereto under the mining or other public-land laws, the presumption arises that the title to the land has passed to the State, but this presumption may be overcome by the submission of a satisfactory showi g to the contrary. Applications pre-

sented under the mining laws covering parts of a school section will be disposed of in the same manner as other contest cases."

This rule has never been expressly repealed. The Department has consistently held that it is applicable to school lands, *Charles L. Ostenfeldt,* 41 L. D. 265; *Santa Fe Pac. R. R.* v. *California,* 34 L. D. 12, and that applications for tracts embraced in an entry of record give rise to no rights until the entry has been cancelled of record, *Walker* v. *Snider,* 19 L. D. 467; *Stewart* v. *Peterson,* 28 L. D. 515, 519; *Hiram M. Hamilton,* 38 L. D. 597.

The rule is an appropriate application to school-land grants of the established policy of the Department to treat as excluded from entry or preemption lands which may, in the execution of the laws of Congress, fall within the claims of others, a policy which avoids confusion and conflicting claims. *Shepley* v. *Cowan,* 91 U. S. 330; *Holt* v. *Murphy,* 207 U. S. 407, 414.

Under both R. S. § 2347, conferring the right to purchase only "vacant coal lands of the United States not otherwise appropriated or reserved by competent authority," and Rule 1, *supra,* as interpreted and applied by the Department, we think that Braffet, by his application, acquired no legal status other than that of a contestant, and that this amounted to no more than a privilege of seeking to restore the lands to entry. The pending contest presented no obstacle to the withdrawal of the privilege by the United States. Compare *Shepley* v. *Cowan, supra; Frisbie* v. *Whitney,* 9 Wall. 187; *The Yosemite Valley Case,* 15 Wall. 77; *Campbell* v. *Wade,* 132 U. S. 34, 37; *United States* v. *Norton,* 19 F. (2d) 836; *Alice M. Reason,* 36 L. D. 279, 280–1; *Instructions,* 40 L. D. 415, 416, 417. Plainly it was withdrawn by the provisions of the Leasing Act, already quoted, unless saved by the exception "in favor of valid claims existent at the date of passage." Even if so saved the land would have been

restored to entry only if the contest were determined in respondent's favor, which was not done.

But we think that the exception in § 37 was not intended to save so nebulous and insubstantial a claim as that of the privilege of contesting the presumptive title of the state. The construction argued for would tend to defeat the purpose of the Leasing Act which was to prevent the sale of the mineral lands of the United States where substantial rights had not been acquired in them, and to permit their exploitation only by lessees paying royalties to the Government. The reference in § 37 to valid claims " thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery " at least suggests that they embrace only such substantial claims as would on compliance with the provisions of the former law ripen into ownership; such claims as might be acquired under the mining laws by location, possession and development which, if continued to discovery and entry, would entitle the claimant to a patent. That such was the purpose is established by the Congressional debates. 58 Cong. Rec. pt. 5, pp. 4577–4585. 66th Cong. 1st Sess.

Here the claim of the contestant was not one which would necessarily ever come to fruition in ownership for, if successful, he would not have been entitled to entry or patent in preference to any other citizen desiring to apply for the land. In the absence of a statute or a departmental regulation securing it, there is no preference right. Compare *Hartman* v. *Warren,* 76 Fed. 157; *Howell* v. *Sappington,* 165 Fed. 944; *Charles L. Ostenfeldt,* 41 L. D. 265, 267. As the provisions of the Leasing Act precluded the contestant, if successful, from purchasing the lands in question as coal lands, his contest was rightly dismissed, and it becomes unnecessary to consider the effect upon the proceedings in the Department of the withdrawal of the State's protest.

Whether if the situation were otherwise the Secretary could by a mandatory injunction be directed to issue a patent, we need not consider. No decision of this Court has given sanction to such a direction.

Reversed.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY *v.* RISTY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA.

No. 501. Argued February 21, 23, 1928.—Decided April 9, 1928.

1. A decree dismissing a suit to enjoin special tax assessments which in terms is without prejudice to the right of the plaintiff to contest the matters in question as though the suit had not been instituted or the decree entered, does not bar subsequent litigation of the same question. P. 569.
2. Due process of law does not require notice of a proceeding to determine merely whether an improvement shall be constructed, if land owners are later afforded an opportunity to be heard and to show that their property should not be assessed. P. 573.
3. A land owner, who, being duly notified, fails to avail himself of an opportunity afforded by a state statute to be heard upon the question whether his land will be benefited by a proposed public improvement and upon the constitutionality of including it in the proposed improvement district, cannot raise the question in this Court in a suit attacking the resulting assessment. P. 574.

Affirmed.

APPEAL from a decree of the District Court refusing an interlocutory injunction against apportionment and assessment of benefits on appellant's land for the maintenance of a drainage system.

The suit was brought by Byram et al., as Receivers of the C., M. & St. P. Ry. Co. The C., M. & St. P. R. R. Company was substituted in this Court.

Messrs. H. E. Judge and *T. M. Bailey,* with whom *Messrs. C. O. Bailey, H. H. Field, O. W. Dynes, H. H.*

Triestal, R. L. Kennedy, H. O. Hepperle, T. L. Fuller, and *J. H. Voorhees* were on the brief, for appellants.

Messrs. Norman B. Bartlett and *Elbert O. Jones,* with whom *Messrs. Benoni C. Matthews, John H. Fitzpatrick,* and *Enos G. Jones* were on the brief, for appellees.

Mr. Justice Stone delivered the opinion of the Court.

This is a suit brought by appellants, receivers of the Chicago, Milwaukee & St. Paul Railway Co. in the district court for South Dakota against the appellees, county commissioners of Minnehaha County, to enjoin the apportionment and assessment of benefits upon appellants' land for the maintenance of a drainage system, under the state agricultural drainage statutes, S. Dak., Laws 1907, c. 134, reenacted as S. Dak. Rev. Code (1919) §§ 8458–8491, as amended by S. Dak., Laws 1920, c. 46, on the ground that the statutes and the proceedings had under them are in conflict with the Fourteenth Amendment of the federal Constitution. From an order of the district court, three judges sitting, denying an application for an interlocutory injunction the case comes here on direct appeal. Jud. Code §§ 238, 266; *Smith* v. *Wilson,* 273 U. S. 388.

One phase of the controversy now presented and the statutes involved were before this Court in *Risty* v. *Chicago, Rock Island and Pacific Ry.,* 270 U. S. 378. In that case it appeared that the railroad company, which is represented by the appellants here, owned lands in Minnehaha County, some of which had not been included within an established drainage district known as "Ditch No. 1 and Ditch No. 2." Those ditches having been seriously damaged by floods, a proceeding had been begun before the county commissioners for the enlargement and reconstruction of the system, now described as "Drainage District No. 1 and 2," with the object of assessing the benefits and cost of the work on lands of the railroad

company and others lying both within and without the original drainage district.

The suit was begun by the railroad company in the district court for South Dakota to enjoin the county officers from making any apportionment and assessment of benefits affecting the property of the railroad company, on the ground that the drainage statutes of South Dakota and the proceedings under them violated the Fourteenth Amendment of the federal Constitution. The district court held that the statutes were valid and constitutional but that the assessments for reconstruction and maintenance of the existing drainage system, so far as applied to lands outside the original drainage district, were unauthorized by the state statutes. *Chicago, Rock Island and Pacific Ry.* v. *Risty,* 282 Fed. 364. No appeal was taken by the railroad company from the decree of the district court, but on appeal by the county officials so much of the decree as involved the construction of the drainage statutes and the application to lands outside of the original drainage district was affirmed by the circuit court of appeals for the eighth circuit, 297 Fed. 710, and by this Court in *Risty* v. *Chicago, Rock Island and Pacific Ry., supra.*

Following the decision in this Court the appellants began the present suit, in which they raised anew the questions as to the constitutionality of the South Dakota drainage statutes, and sought relief the effect of which, if granted, would be to enjoin those assessments on the land of plaintiffs within the original drainage district which had been left undisturbed by the decree in the earlier litigation.

Appellees, on the present application for an interlocutory injunction, have set up that decree as *res judicata* as to all questions presented here. But an examination of the decree of the district court in the earlier litigation, set out in the present record, discloses that by its terms

the decree was "without prejudice to any and all rights of the plaintiff to contest any such apportionment of benefits, or any assessment which may be made" affecting the land of appellants within the original drainage district and saving the right of the railroad company in this regard as though "this suit had not been instituted or this decree entered." Although reliance is placed upon this decree as *res judicata,* neither the record nor the briefs disclose the reason for the insertion of these provisions and no reason is suggested why its language is not to be taken at its face value as saving to appellants the right to litigate anew the questions now presented.

Since our decision in *Risty* v. *Chicago, Rock Island and Pacific Ry., supra,* the supreme court of South Dakota in *State* v. *Risty,* 51 S. Dak. 336, has had occasion to pass upon the construction and the constitutionality of the South Dakota drainage statutes. Taking a different view from that of this Court and the lower courts in *Risty* v. *Chicago, Rock Island and Pacific Ry., supra,* it held that the proceedings involved in that litigation and in this, for the assessment of benefits upon lands both within and without the original drainage district, were authorized by the statutes of South Dakota. It held that the action taken for reconstruction of the old drainage ditches was not a proceeding for maintenance or repair of the old system, but a new and independent proceeding, and that the statutes authorized the establishment of a new drainage district embracing all the lands benefited, whether included in the old district or not. It also construed the sections regulating the proceedings for assessing the benefits and costs of the reconstruction and enlargement of the drainage ditches and, as construed, held them constitutional. This construction of the state statutes by the highest court of the state we, of course, accept. *People of Sioux County* v. *National Surety Co.,* 276 U. S. 238; *St. Louis & Kansas City Land Co.* v. *Kansas City,* 241 U. S. 419, 427.

As determined by the state supreme court in *State* v. *Risty, supra,* the proceedings resulting in the proposed assessment now assailed were taken and authorized under S. Dak. Rev. Code (1919) §§ 8458–8463, as amended. Under § 8459 upon petition of the owners of land "likely to be affected by the proposed drainage" the Board of County Commissioners, under § 8460, caused a survey to be made of the proposed drainage project and, under § 8461, upon the filing of the surveyor's report with the Commission, fixed the line of the proposed drainage ditch as that of the preexisting ditches No. 1 and No. 2, but increased the width of the ditch from approximately forty feet, as originally established, to ninety feet. Notice of hearing upon the petition was given by publication and posting as required by § 8461, printed in the margin.[1]

[1] § 8461. Surveyor's Report—Notice of Hearing.—The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall determine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceedings for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claim therefor at such hearing.

The notice as required described "the route of the proposed drainage and the tract of country likely to be affected thereby in general terms" and specifically included the lands of the appellants, which are described in the present bill of complaint. Upon the hearing the Board of County Commissioners, acting under § 8462, made its order establishing the drainage as prayed. Proceeding under § 8463, printed in the margin,[2] the Board then fixed tentatively the proportion of benefits of the drainage among the lands affected and particularly described and gave published notice of the time and place for all owners of the land to be heard on equalization of the benefits.

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[2] § 8463. Equalization of Benefits.—After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds at the date of the filing of the petition and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed.

At the outset appellants challenge the constitutionality of the statutes and proceedings on the ground that the notice of the hearing on the petition for the establishment of the drainage project fell short of constitutional requirements. It is said that notice to all persons affected by the proposed drainage, describing only "the route of the proposed drainage and the tract of country likely to be affected thereby in general terms" is too vague and indefinite to constitute notice to any land owner other than those through whose land the drainage ditch is to be constructed.

If it were necessary to our decision, we should hesitate to say that the required notice was insufficient, at least as to the owners of land embraced within the old district. For it showed unmistakably that the projected improvements were in substance an enlargement of a drainage ditch for the construction of which the lands within the district, including appellants', had already been assessed. No particular form of notice is necessary to satisfy constitutional requirements. If it be such as fairly apprises the land owner of what is proposed and affords reasonable opportunity to be heard it suffices. *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276, 283. No one who, like appellants, had paid assessments for the original construction of the ditch could have doubted that his lands were within the tract "likely to be affected" by the proposed reconstruction.

But in any case there is no constitutional reason why any notice need have been given, for the purpose of the first hearing is not to determine what lands are to be included in the assessment district. It was said by the supreme court of South Dakota in *State* v. *Risty,* 51 S. Dak. at 354:

"The hearing upon this notice is not for the purpose of determining the particular land that may be benefited by the construction of ditch, nor the extent to which any

tract of land may be benefited, but to determine whether the proposed drainage or any variation thereof shall be 'conducive to the public health, convenience, or welfare, or necessity or practical for draining agricultural lands.' If the board finds that such drainage will be conducive to the public health, convenience, or welfare, or necessary or practical for draining agricultural lands, the board may establish the drainage accordingly and proceed to let contracts for the work. It then becomes necessary to determine the particular tracts of land that will be benefited by the drainage and the extent to which it will be benefited."

Due process of law does not require notice of a proceeding to determine merely whether an improvement shall be constructed without at the same time establishing the boundaries of the assessment district. It is enough if land owners who may be assessed are later afforded a hearing upon the assessment itself. *Londoner* v. *Denver*, 210 U. S. 373, 378; *Goodrich* v. *Detroit*, 184 U. S. 432, 437, *et seq.*; *Voight* v. *Detroit City*, 184 U. S. 115, 122; *Embree* v. *Kansas City Road District*, 240 U. S. 242; *Soliah* v. *Heskin*, 222 U. S. 522.

No objection of substance is made to the sufficiency of the notice of the hearing on the equalization of benefits. The lands of the railroad, described in the complaint, were described in the notice as required by the statute. At that time no assessment district had been established and no lien had attached to them nor would any attach until a final assessment had been made. § 8464; *Risty* v. *Chicago, Rock Island and Pacific Ry.*, *supra*, 388. As the statute was construed by the supreme court of South Dakota in *State* v. *Risty*, 51 S. Dak. at 354, upon the hearing for the equalization of benefits under § 8463, "an interested party may appear and show any reason why his property should not be assessed that he could have shown at the hearing for determining whether the drainage

should be established. If his property will not be benefited by the establishment of the drainage this may be shown at either hearing, and if shown at either hearing his property will not be assessed."

The state court further held that upon this hearing the land owner may be heard upon the question whether his lands are benefited by the drainage system and the extent of those benefits, if any, or whether the proposed assessment was unjust or unwarranted and may raise all constitutional objections to the assessment; citing *Milne* v. *McKinnon,* 32 S. Dak. 627, 631, 632; *State ex rel. Curtis* v. *Pound,* 32 S. Dak. 492. From determinations of the Board on either hearing appeals lie to the circuit court under § 8469.

Appellants did not appear or file objections on the date set for either hearing and under the state statute as interpreted in *State* v. *Risty, supra,* thus lost their right to urge any objection to the assessment. As the inclusion of appellants' lands in the new assessment district depended wholly upon their being benefited by the proposed improvements, their failure to avail of the opportunity afforded by the statute to make the objections to the assessment now urged forecloses all consideration of those objections here. *Farncomb* v. *Denver,* 252 U. S. 7; *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710; *Gorham Mfg. Co.* v. *Tax Commissioner,* 266 U. S. 265; *First National Bank* v. *Weld County,* 264 U. S. 450.

Affirmed.

SHAW, AUDITOR, *v.* GIBSON-ZAHNISER OIL CORPORATION ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 234. Argued February 29, March 1, 1928.—Decided April 9, 1928.

Land belonging to a non-Indian citizen of Oklahoma and subject to state, county and municipal taxation, was purchased October 24,

1915, under supervision of a county court and the Secretary of the Interior, for a minor, full-blood Creek Indian with moneys derived as royalties from a departmental lease of his restricted allotment. The deed, as required by the Secretary and the court, provided that the land should not be alienated or leased during the lifetime of the grantee, prior to April 26, 1931, without the consent and approval of the Secretary. The land was let for oil and gas exploitation under a departmental lease, and a tax was levied upon the leaseholders, under the state law, measured by a percentage of the gross value of oil and gas produced, less the royalty interest of the Indian owner. *Held,* in response to questions from the Circuit Court of Appeals:

1. That the Secretary of the Interior, when the land was purchased, had no power to exempt it from such taxation. P. 577.

2. The tax was not a forbidden tax upon a federal instrumentality. *Id.*

RESPONSE to questions certified by the Circuit Court of Appeals, concerning a judgment of the District Court in favor of the above-named corporation, in an action to recover money paid under protest as state taxes.

Mr. V. P. Crowe, Assistant Attorney General of Oklahoma, with whom *Mr. Edwin Dabney, Attorney General,* was on the brief, for Shaw, State Auditor.

Mr. Charles B. Cochran for Gibson-Zahniser Oil Corporation.

MR. JUSTICE STONE delivered the opinion of the Court.

Defendants in error brought this suit in the district court for western Oklahoma against plaintiff in error to recover state taxes paid under protest. Judgment was given for the plaintiff, and the case is now pending on writ of error in the court of appeals for the eighth circuit. That court has certified to this, questions of law concerning which it asks instructions for the proper decision of the cause. Jud. Code § 239.

The certificate discloses that defendants in error are the assignees of a departmental oil and gas lease of land belonging to Miller Tiger, a full blood Creek Indian. The leased land was purchased for Tiger while a minor by his guardians, with the permission of the county court of Okmulgee County, Oklahoma. The purchase price came from the accumulated royalties of a departmental lease of his restricted allotted lands. The purchase was made of a non-Indian citizen of Oklahoma and the deed, in compliance with conditions exacted by the Secretary of the Interior and the county court, provided that the land "should not be alienated or leased during the lifetime of the grantee prior to April 26, 1931, without the consent of and approval by the Secretary of the Interior." Before the purchase in 1915 the land had been subject to state, county and municipal taxation. Since then local *ad valorem* taxes on the land have been paid without objection by the United States Indian Agency. The tax now in question was levied and collected under Okla. Comp. Stats. (1921) § 9814, which imposes on those engaged in the production of oil and gas a tax equal to 3% of the gross value of the oil and gas produced "less the royalty interest." The questions certified are as follows:

1. Had the Secretary of the Interior, on October 24, 1915, when this land was purchased, power to exempt from such state taxation land purchased under his supervision for a full blood Creek Indian with trust funds of that Indian, where the land so purchased was, at that time, subject to all State taxes?

2. Is this tax a forbidden tax upon a federal instrumentality?

In *Sunderland* v. *United States,* 266 U. S. 226, a restriction against alienation like that in the present case imposed by the Secretary on lands purchased for a Creek

Indian, as were Tiger's, under § 1, c. 199 of the Act of May 27, 1908, 35 Stat. 312, was held to be a valid exercise of the power of the Secretary to remove restrictions from the land of full blood Indians "wholly or in part, under such rules and regulations concerning terms of sale and disposal of proceeds for the benefit of the respective Indians as he may prescribe." In an earlier case, *McCurdy* v. *United States,* 246 U. S. 263, this Court had held that a similar restriction upon lands similarly purchased for an Osage Indian could not have the effect contended for there, and here, of exempting the land from state taxation for the reason that under the applicable provisions of a different statute, § 5, c. 83, Act of April 18, 1912, 37 Stat. 86, the Secretary was without authority to impose the restriction. And, in *United States* v. *Ransom,* 263 U. S. 691, affirming 284 Fed. 108, it was held, on the authority of *McCurdy* v. *United States, supra,* that the state had power to tax lands purchased for a Creek Indian citizen with restrictions against alienation imposed by the Secretary under § 1 of the Act of May 27, 1908, which was the statute later passed on in *Sunderland* v. *United States, supra.* The construction to be placed on these decisions is that the lands now in question, and hence the interest of the lessee in them, are not such instrumentalities of the government as will be declared immune from taxation in the absence of an express exemption by Congress and that the mere act of the Secretary in imposing the restriction is not the exercise of any power which may reside in Congress to exempt them from taxation.

What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514. The end sought and the mode of attaining it adopted by Congress in the legislation providing for the welfare of the Indians by setting

apart, by allotment or otherwise, tribal lands or the public domain, restricted for their benefit, led to the conclusion that those lands and the uses of them were so intimately connected with the performance of governmental functions as clearly to require independence of all state control so complete that nothing short of an express declaration by Congress would have subjected them to state taxation.

Governmental agencies similarly held to be exempt are national banks, *First National Bank of Hartford* v. *Hartford,* 273 U. S. 548; bonds of the national government, *Weston* v. *City Council of Charleston,* 2 Pet. 449, 467; such were and still are the restricted allotted or tribal lands of the Indians: neither leases of those lands, *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522, nor the exploitation of the land by the lessee, *Howard* v. *Gypsy Oil Co.,* 247 U. S. 503; *Large Oil Co.* v. *Kansas,* 248 U. S. 549; *Choctaw & Gulf R. R.* v. *Harrison,* 235 U. S. 292; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, nor his income from the lease, *Gillespie* v. *Oklahoma,* 257 U. S. 501, may be taxed by the state.

The early legislation affecting the Indians had as its immediate object the closest control by the government of their lives and property. The first and principal need then was that they should be shielded alike from their own improvidence and the spoliation of others but the ultimate purpose was to give them the more independent and responsible status of citizens and property owners. The present statute which enabled Miller Tiger to become the owner of the lands leased to the plaintiff is typical of the latter course of Indian legislation, which discloses a purpose to accomplish that end not only by the gradual relinquishment of restrictions upon the lands originally allotted to the Indians but by encouraging their acquisition of other property and gradually enlarging their control over it until independence should be achieved. See *McCurdy* v. *United States, supra.*

The act under which Tiger's allotted land was leased is entitled "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes." It frees from all restriction the lands of all allottees, of less than three-quarters Indian blood. Section 1 empowers the Secretary of the Interior to remove the restrictions from the lands of full-blood Indians "wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." Section 2 permits the allottees of lands from which restrictions have not been removed to lease them for a period of five years, "Provided, that leases of restricted lands for oil, gas or other mining purposes, . . . may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise." Under § 4 "all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes." In this as in other Indian legislation, opportunity is afforded for their emancipation by imposing upon them duties as well as giving them the privileges of citizens and property owners, including the duty to pay taxes.

In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. To hold them immune would be inconsistent with one of the very

purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks. See *Goudy* v. *Meath,* 203 U. S. 146, 149; *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 371; *Fidelty & Deposit Co.* v. *Pennsylvania,* 240 U. S. 319, 323; *Railroad Co.* v. *Peniston,* 18 Wall. 5; *Choctaw O. & G. R. R.* v. *Mackey,* 256 U. S. 531, 537; *Central Pac. R. R.* v. *California,* 162 U. S. 91, 126. These lands we take to be of that character.

Little need be said as to the power of the Secretary of the Interior to exempt the land and its uses from taxation. The power, if it exists, is one conferred by Congress, but neither it nor the Secretary has in terms purported to make or authorize such an exemption.

The Act of May 27, 1908, contains no express exemption from taxation of the proceeds of restricted lands, but § 4 expressly subjects lands from which restrictions have been removed to state taxation. This section was adopted in response to representations that the revenue of the state of Oklahoma was insufficient for state purposes, that large areas of lands within the state allotted to Indians were exempt from taxation as agencies of the federal government and that Indian citizens were enjoying the benefit of local government without taxation. Report of the Senate Committee on Indian Affairs, S. Rep. No. 575, 60th Cong., 1st Sess.; Report of the House Committee on Indian Affairs, H. Rep. No. 1454, 60th Cong., 1st Sess.

At the time of this legislation restrictions on some allotted lands had been removed by reason of the expira-

tion of the restricted period. There were also allotments on behalf of allottees dying before allotment which in the hands of their heirs were unrestricted. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286. It cannot be assumed that Congress at a time when it was withdrawing allotted lands from their former exemption in order that Indian citizens might assume the just burdens of state taxation, intended to extend a tax exemption by implication. In any case the Secretary of the Interior has never, by rule or regulation or other action, purported to exempt such lands from state taxation. No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land. See *United States* v. *Ransom, supra; United States* v. *Brown*, 8 F. (2d) 564; *United States* v. *Gray*, 284 Fed. 103; *United States* v. *Mummert*, 15 F. (2d) 926.

Question 1: Answered No.

Question 2: Answered No.

HEINER, COLLECTOR, *v.* TINDLE ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 341. Argued March 7, 1928.—Decided April 9, 1928.

1. Under the Revenue Act of 1918, § 215, (a), 5, the devotion of a house theretofore purchased and used as the taxpayer's residence, exclusively to the production of taxable income in the form of rentals, is a "transaction entered into for profit" as of the date when the change was made; and when such change occurred before March 1, 1913, and the new use continued until the property was sold at a loss after the date of the Act, the amount of loss deductible in computing net income is the difference between the sale price and the value of the property on the date of the change, or, if that value be larger than the March 1, 1913, value, then the difference between the sale price and the value on March 1, 1913. P. 585.

2. Article 141 of Treasury Regulations 45, refers to property used by the taxpayer as a residence up to the time of sale. P. 586.

18 F. (2d) 452, reversed.

CERTIORARI, 275 U. S. 514, to a judgment of the Circuit Court of Appeals, which reversed a judgment for the Collector in an action to recover money paid as income taxes.

Mr. Gardner P. Lloyd, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for petitioner.

Mr. James Walton, with whom *Mr. Clarence A. Miller* was on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

Before 1892 the late Philander C. Knox built a dwelling house in Pittsburgh, at a total cost for land and buildings of $172,000. He occupied the house as a residence until 1901 when, circumstances requiring his residence elsewhere, he leased the property at a stipulated rental. He continued so to lease it from October 1st in that year until 1920, when it was sold for $73,000. The fair market value of the property on March 1, 1913, was $120,000. Its value in 1901 does not appear. In his income tax return for 1920 he deducted from gross income the difference between the selling price of the property and its March 1, 1913, value, less depreciation from that date to the date of sale. The commissioner disallowed the deduction and assessed a correspondingly increased tax, which was paid under protest. The present suit was brought in the district court for western Pennsylvania to recover the additional tax assessed. The trial was to the court, a jury having been waived by written stipulation. Judgment was given for the collector, 17 F. (2d) 522, which was reversed by the circuit court of appeals for the third circuit. 18 F. (2d) 452.

The tax was assessed under the Revenue Act of 1918, c. 18, 40 Stat. 1057. Section 214 specifies deductions which may be made from gross income in computing the tax and sub-section (a)5 permits the deduction of "losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business." Section 215 provides that "in computing net income no deduction shall in any case be allowed in respect of (a) personal, living, or family expenses." Treasury Regulations 45, promulgated April 17, 1919, and in force during 1920, provide: "Art. 141 . . . A loss in the sale of an individual's residence is not deductible." This was amended on January 28, 1921, to read: " . . . A loss in the sale of residential property is not deductible unless the property was purchased or constructed by the taxpayer with a view to its subsequent sale for pecuniary profit." This regulation has remained unchanged under the Revenue Acts of 1921, 1924 and 1926. See Art. 141 of Regulations 62, Regulations 65 and Regulations 69.

That the exchange value of a dwelling house may increase or diminish is a consideration not usually overlooked by one who purchases it for residential purposes, but the quoted Regulations appear to assume that the acquisition of such property cannot be a transaction for profit within the meaning of sub-section (a)5 of § 214, if the dominating purpose of it is the use of the property for a home. The correctness of that view is not before us, for there is no finding that the taxpayer built his dwelling with any hope or expectation of profit. See *Appeal of D'Oench,* 3 B. T. A. 24.

But the findings amply support the view of the court of appeals that the purpose to use the property as a residence of the taxpayer came to an end when it was leased

in 1901, and that from that date until it was sold nineteen years later it was devoted exclusively to the production of a profit in the form of net rentals. It is not questioned that if in 1901 the property had been purchased for that use or inherited and so used the loss might have been deducted, but it is said, as the district court held, that the only transaction entered into with respect to the property was the purchase of the land and the erection of the house, regardless of the use which might afterwards be made of it, and that these acts did not appear to be a transaction entered into for profit.

But the words "any transaction" as used in sub-section (a)5 are not a technical phrase or one of art. They must therefore be taken in their usual sense and, so taken, they are, we think, broad enough to embrace at least any action or business operation, such as that with which we are now concerned, by which property previously acquired is devoted exclusively to the production of taxable income. We can perceive no reason why they should not be so taken unless that construction is inconsistent with the purpose or with particular provisions of the Act. Section 214, read as a whole, discloses plainly a general purpose to permit deductions of capital losses wherever the capital investment is used to produce taxable income, and the inclusion of the present deduction in those described in sub-section (a)5 would seem to be entirely harmonious with that purpose.

But it is pointed out that § 202 of the Revenue Act of 1918, prescribing the method of computing gain or loss upon the sale of property, makes value as of March 1, 1913, or cost if acquired later, the basis of the computation. It is said that this is inconsistent with the use of the market value of the property at the date of rental as the basis of the computation, which would be necessary if the construction contended for were given to sub-section

(a)5, and that in any case a computation on that basis would involve administrative difficulties in determining the value, which should lead to a different interpretation.

But it is obvious that § 202 is not all inclusive. The same and no greater inconsistency and difficulty arise in the case of property acquired by gift, bequest or devise, when market value at the time of acquisition by the donee and not cost is necessarily the basis of computing the tax. That in such cases the difference between the sale price and market value at the date of acquisition, if after March 1, 1913, is deductible under sub-section (a)5, is not questioned. The ascertainment of market value of the property at that date would not seem to involve any greater administrative difficulty than the ascertainment of market value on March 1, 1913. Section 202 itself provides that in the case of exchange the property shall be taken at this fair market value, and under the Act of 1918 this was likewise provided for in the case of property acquired by gift, devise or bequest, by Regulations 45, Art. 1562, which was incorporated in the later acts. Revenue Act of 1921, c. 136, 42 Stat. 227, § 202 (a)2; Revenue Act of 1924, c. 234, 43 Stat. 253, § 204 (a)2; Revenue Act of 1926, c. 27, 44 Stat. 9, § 204 (a)2.

For the purpose of computing the loss resulting from this particular transaction we think it must stand on the same footing as losses resulting from a similar use of property acquired by gift or devise and that whenever needful the fair value of the property at the time when the transaction for profit was entered into may be taken as the basis for computing the loss.

Article 141 of the Regulations presents no necessary inconsistency with the construction of § 214(a) 5, contended for by the respondent. The article both in its original and in its amended form obviously refers to the

sale of residential property of the taxpayer, that is to say, property used by him as a residence up to the time of the sale. Only if that is its meaning can it be reconciled with the Treasury rulings that losses on the sale of residential property acquired by gift, devise or bequest and devoted to rental purposes may be deducted. The loss here has resulted from the sale of property not used for residential purposes by the taxpayer, and the transaction entered into for profit and resulting in the loss was not the purchase of the property but its appropriation to rental purposes. The article of the Regulations by its terms has no application to a loss so incurred.

The findings show that the property was sold for less than its cost and the loss deducted was the difference between its March 1, 1913, value and the sale price. The only loss deductible here under sub-section (a)5 is one incurred in a transaction entered into for profit, later than the date of purchase. For all that appears from the findings the loss which had occurred between the date of purchase and March 1, 1913, may have occurred before the property was devoted to rental purposes. For that reason the findings do not support the judgment. The cause should be remanded for a new trial so that the value of the property as of October 1, 1901, when rented, may be found. If that value is larger than the value of March 1, 1913, the deduction made below should be allowed; if less, only the difference, if any, between its then value and the sale price should be allowed. See *United States* v. *Flannery,* 268 U. S. 98; *McCaughn* v. *Ludington,* 268 U. S. 106.

Reversed.

DECISIONS PER CURIAM, FROM JANUARY 4, 1928, TO AND INCLUDING APRIL 9, 1928, OTHER THAN DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI.

No. 122. Leo L. Spears *v.* State Board of Medical Examiners of Colorado. January 9, 1928. *Per Curiam.* The petition for rehearing is denied, but the Court's order of dismissal entered December 12, 1927, is hereby changed so as to read: "Dismissed because the record does not disclose that any substantial federal question was made in the presentation of the cause in the State Supreme Court. *McCorquodale* v. *State of Texas,* 211 U. S. 432, 436, 437; *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.,* 228 U. S. 326, 333, 334; *Godchaux Co.* v. *Estopinal,* 251 U. S. 179, 180, 181." *Messrs. Carle Whitehead* and *Albert L. Voge* for plaintiff in error. *Messrs. Wm. L. Boatright* and *Charles H. Haines* for defendant in error.

No. —, original. The State of Connecticut *v.* The Commonwealth of Massachusetts. January 9, 1928. The motion for leave to file the bill of complaint herein is granted, and process ordered to issue returnable on Monday, March 5, 1928. *Mr. Ernest L. Averill* for complainant.

No. 454. Harry Hawkins et al. *v.* Elmer E. Klein et al. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss or affirm submitted January 3, 1928. Decided January 9, 1928. *Per Curiam.* The writ of error is dismissed on the authority of §237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. *Jett Bros. Distilling Co.* v. *City of Carrollton,* 252 U. S. 1, 5, 6. Treating the writ of error as an application for certiorari,

the application is denied. *Messrs. Vern E. Thompson* and *C. H. Merillat* for defendants in error, in support of the motion. *Mr. C. B. Ames* for plaintiffs in error, in opposition thereto.

No. 548. HENRY O. HEAD *v.* OBION COUNTY, FOR THE USE OF HOUSER CREEK DRAINAGE DISTRICT. Error to the Supreme Court of the State of Tennessee. Submitted January 3, 1928. Decided January 9, 1928. *Per Curiam.* Dismissed for want of a substantial federal question on the authority of *Pierce et al.* v. *Obion County,* 275 U. S. 509; *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. Rice Maxey* and *Henry O. Head* for plaintiff in error. No appearance for defendant in error.

No. 592. JAMES C. COLGATE *v.* PHILADELPHIA ELECTRIC POWER COMPANY ET AL. Appeal from the District Court of the United States for the Eastern District of Pennsylvania. Argued January 5, 1928. Decided January 9, 1928. *Per Curiam.* Dismissed for want of a substantial question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. E. J. Dimock,* with whom *Messrs. Charles F. Carusi, Benjamin C. Atlee,* and *Eleanor S. Burch* were on the brief, for appellant. *Messrs. John Fox Weiss* and *William Clarke Mason* were on the brief for appellees.

No. 143. EMMA SANGO *v.* WILLIAM WILLIG. Error to the Supreme Court of the State of Oklahoma. Argued January 5, 1928. Decided January 9, 1928. *Per Curiam.* The writ of error is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13,

1925 (43 Stat. 936, 937), for lack of jurisdiction. Treating the writ of error as an application for certiorari, the certiorari is denied. *Mr. Wm. Neff* for plaintiff in error. *Mr. G. R. Horner,* with whom *Mr. Lafayette Walker* was on the brief, for defendant in error.

No. 158. JOHN LAPIQUE, SUCCESSOR IN INTEREST OF THE ESTATE OF MARIA ESPIRITU CHILJULLA DE LEONIS, *v.* FRANK E. WALSH ET AL. Appeal from the District Court of the United States for the Southern District of California. Submitted January 6, 1928. Decided January 9, 1928. *Per Curiam.* Dismissed for lack of jurisdiction in this Court under § 238 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 938), on the authority of *Southern Pacific Co.* v. *United States,* 270 U. S. 103, 105. *Mr. John Lapique, pro se. Mr. Herbert J. Goudge,* with whom *Messrs. Everett W. Mattoon* and *Lee A. Dayton* were on the brief for appellees, submitted.

No. 166. UNITED STATES EX REL. NIELS PETER CLAUSSEN *v.* HENRY H. CURRAN, COMMISSIONER OF IMMIGRATION. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Suggestion of abatement submitted January 6, 1928. Decided January 9, 1928. *Per Curiam.* In this case the order of the District Court dismissing the writ of habeas corpus was entered on February 1, 1926; an appeal was allowed on February 9, 1926, to the Circuit Court of Appeals for the Second Circuit, which court, on December 14, 1926, entered a judgment affirming that of the District Court. A writ of certiorari was granted by this Court on March 7, 1927.

It appearing that Henry H. Curran, sued herein as Commissioner of Immigration, resigned such office on March 31, 1926, and was succeeded by Benjamin M. Day,

who now holds that office, and that no motion was made under § 11 of the act of February 13, 1925 (c. 229 43 Stat. 936, 941), asking the Court to "permit the cause to be continued and maintained by or against the successor in office of such officer," and that the six months' period, within which such a motion could have been made, has expired, the Court now vacates the judgments entered in the District Court and in the Circuit Court of Appeals and remands the cause to the District Court with a direction to dismiss the cause as abated. *Mr. Silas B. Axtell* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 686. ARRINGTON *v.* GRAND LODGE. See post, p. 617.

No. 153. SEABOARD AIR LINE RAILWAY COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY *v.* WILLIAM T. LEE ET AL. Appeal from the District Court of the United States for the Eastern District of North Carolina. Argued January 9, 10, 1928. Decided January 16, 1928. *Per Curiam.* Affirmed on the authority of *Atlantic Coast Line R. R. Co.* v. *Standard Oil Co. of Kentucky* and *Standard Oil Co. of Kentucky* v. *Atlantic Coast Line R. R. Co.*, 275 U. S. 257. *Mr. Frank W. Gwathmey,* with whom *Messrs. Thomas W. Davis* and *Murray Allen* were on the brief, for appellants. *Mr. Sidney S. Alderman,* with whom *Messrs. F. P. Hobgood, Jr., Dennis C. Brummitt,* and *P. W. McMullan* were on the brief, for appellees.

No. 155. BRYANT ARNOLD, DOING BUSINESS AS KANSAS CITY HAY COMPANY, ET AL. *v.* FOREST HANNA AND C. P. ANDERSON. Error to the Supreme Court of the State of Missouri. Argued January 10, 1928. Decided January

16, 1928. *Per Curiam.* Affirmed on the authority of (1) *Watters* v. *People of the State of Michigan,* 248 U. S. 65, 66; (2) *Payne* v. *State of Kansas,* 248 U. S. 112, 113. *Mr. Charles M. Blackmar* for plaintiffs in error. *Mr. North T. Gentry* was on the brief for defendants in error.

No. 179. Gulf, Mobile and Northern Railroad Company *v.* L. G. Touchstone. On writ of certiorari to the Supreme Court of the State of Mississippi. Submitted January 12, 1928. Decided January 16, 1928. *Per Curiam.* Reversed on the authority of *Jacobs* v. *Southern Railway Co.,* 241 U. S. 229, 232, 236. *Messrs. Ellis B. Cooper* and *Walter S. Welch* for petitioner. *Mr. W. Calvin Wells* for respondent.

No. 180. Ernest F. Dunham *v.* Albert Ottinger, individually and as Attorney General of the State of New York. Error to the Supreme Court of the State of New York. Submitted January 12, 1928. Decided January 16, 1928. *Per Curiam.* Dismissed for want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. George Gordon Battle,* with whom *Messrs. Ernest F. Dunham, Joseph W. Spencer,* and *Louis Marshall* were on the brief for plaintiff in error, submitted. *Mr. William H. Milholland,* with whom *Mr. Albert Ottinger* was on the brief, for defendant in error, submitted.

No. 172. Lloyd Littrell, Receiver, *v.* Peter G. Cameron, Secretary of Banking of Pennsylvania, et al. Error to the Supreme Court of the State of Pennsylvania. Argued January 13, 1928. Decided January 16, 1928. *Per Curiam.* The judgment of the Supreme Court of the

State of Pennsylvania in this case is affirmed for the reason that, on the record and on the facts no substantial federal question is presented. *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147. *Mr. William S. Moorhead* for plaintiff in error. *Messrs. E. Lowry Humes* and *Leonard K. Guiler* were on the brief for defendants in error.

No. 184. Fred M. Kirby *v.* United States. On writ of certiorari to the Court of Claims. Argued January 17, 18, 1928. Decided February 20, 1928. *Per Curiam.* Affirmed on the authority of (1) *Mason* v. *Routzahn, Collector of Internal Revenue*, 275 U. S. 175; (2) *United States* v. *Anderson*, 269 U. S. 422, 443. *Mr. Martin A. Schenck*, with whom *Mr. Edward Cornell* was on the brief, for petitioner. *Solicitor General Mitchell*, with whom *Assistant Attorney General Galloway*, and *Mr. L. F. McCormick* were on the brief, for the United States.

No. 187. Fort Smith, Subiaco and Rock Island Railroad Company *v.* Emma Moore, Administratrix. On writ of certiorari to the Supreme Court of the State of Arkansas. Argued January 18, 1928. Decided February 20, 1928. *Per Curiam.* Reversed on the authority of *Gulf, Mobile & Northern R. R. Co.* v. *Wells*, 275 U. S. 455; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Coogan*, 271 U. S. 472, 477, 478. *Mr. James B. McDonough* for petitioner. *Emma Moore, pro se.*

No. 203. Joseph M. Davis and Southern Surety Company *v.* Esther M. Jessup, Administratrix. Error to the Supreme Court of the State of Nebraska. Argued January 20, 1928. Decided February 20, 1928. *Per Cu-*

riam. The writ of error is dismissed for want of a final judgment in the highest court of the State as required by § 237 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), on the authority of *Haseltine* v. *Central Bank of Springfield* (*No. 1*), 183 U. S. 130, 131; *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Arnold* v. *United States, for the use of Guimarin & Co.,* 263 U. S. 427, 434. *Mr. Robert S. Neely,* with whom *Mr. Wymer Dressler* was on the brief, for plaintiffs in error. No appearance for defendant in error.

No. 154. JOHN W. BLODGETT *v.* CHARLES HOLDEN, COLLECTOR OF INTERNAL REVENUE. February 20, 1928.

It is hereby ordered that the opinion in Cause No. 154 of the present term, John W. Blodgett *v.* Charles Holden, Collector of Internal Revenue, on certificate from the United States Circuit Court of Appeals for the Sixth Circuit, heretofore handed down, be modified and made to read in the following manner:

By the Court: An equal division of opinion among the eight Justices who heard and considered this matter renders it impossible categorically to answer certified question No. 2. The other two questions, we think, are not essential. The statements of views by the Justices are enough to show that the tax exacted of Blodgett can not be sustained under §§ 319–324 of the Revenue Act of 1924, and they will enable the Circuit Court of Appeals readily to reach a proper decision. The cause will be remanded there for appropriate action.

The opinion of MR. JUSTICE MCREYNOLDS is amended by striking out the words "And the question is so answered," and by adding thereto "The CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE BUTLER concur in this opinion.

The opinion of MR. JUSTICE HOLMES is concurred in by MR. JUSTICE BRANDEIS, MR. JUSTICE SANFORD, and MR. JUSTICE STONE.

[The opinions of MCREYNOLDS and HOLMES, JJ., the former modified as above ordered, are reported in 275 U. S. 142.]

No. 96. ELLA R. CLARKE *v.* SHOSHONI LUMBER COMPANY AND ALLAN BOYSEN. Error to the Supreme Court of the State of Wyoming. Motion to dismiss submitted February 20, 1928. Decided February 21, 1928. *Per Curiam.* Dismissed for want of jurisdiction. *Messrs. Robert F. Cogswell, D. Avery Haggard* and *Michael A. Rattigan* for defendants in error in support of the motion. *Mr. Wm. J. Hughes, Jr.,* for plaintiff in error in opposition thereto.

No. 13, original. UNITED STATES *v.* STATE OF IDAHO. Motion submitted February 20, 1928. Decided February 27, 1928. *Per Curiam.* The motion by the United States for judgment on the pleadings is granted. It is ordered that the decree as proposed by the United States be entered, and that the Clerk be directed to send a copy thereof to the Governor of the State of Idaho, and to the Secretary of the Interior. *The Attorney General* for the United States. *Mr. F. L. Stephan* for defendant.

No. 631. L. F. VANCE *v.* CHICAGO PORTRAIT COMPANY ET AL. Appeal from the District Court of the United States for the Northern District of Ohio. Motion to dismiss submitted February 20, 1928. Decided February 27, 1928. *Per Curiam.* The motion to dismiss for lack of jurisdiction in this Court under §238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936,

938), is granted. *Mr. John T. Evans* for appellees in support of the motion. *Mr. L. F. Vance, pro se,* in opposition thereto.

No. 430. STATE OF OHIO, ON RELATION OF NATIONAL MUTUAL INSURANCE COMPANY, *v.* WILLIAM C. SAFFORD, SUPERINTENDENT OF INSURANCE; and

No. 431. STATE OF OHIO, ON RELATION OF THE CELINA MUTUAL CASUALTY COMPANY, *v.* WILLIAM C. SAFFORD, SUPERINTENDENT OF INSURANCE. Error to the Supreme Court of the State of Ohio. Argued February 21, 1928. Decided February 27, 1928. *Per Curiam.* The writs of error are dismissed for want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. Arthur I. Vorys* and *Herman L. Ekern* for plaintiffs in error. *Mr. C. S. Younger,* with whom *Mr. Edward C. Turner* was on the brief, for defendant in error.

No. 6, original. STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER. In equity. Order entered March 5, 1928. Announced by MR. JUSTICE SANFORD.

Upon consideration of the responses to the rule to show cause issued on January 9, 1928, it is ordered, adjudged and decreed that clause 1 of the decree entered in this cause on January 3, 1927 (273 U. S. 93), be and is changed so as to read as follows:

"1. The boundary between the State of Texas and the State of Oklahoma constituting the eastern boundary of the Panhandle of Texas and the main western boundary of Oklahoma, is the line of the true one-hundredth meridian of longitude west from Greenwich, extending north from its intersection with the south bank of the South

Fork of Red River to its intersection with the northern boundary line of the State of Texas as surveyed and marked upon the ground by John H. Clark, United States Commissioner, under the Act of June 5, 1858, c. 92, or with a line running due east from the eastern terminus of the Clark survey if it is west of the meridian."

The clerk is directed to transmit copies of this order to the Governors of Texas and Oklahoma, the Secretary of the Interior, and Samuel S. Gannett, Commissioner, respectively.

No. —, original. Ex parte: Thomas E. Williams, Tax Commissioner. March 5, 1928. The motion for leave to file a petition for a writ of mandamus is granted. The petition will be filed, and an order, returnable April 9 next, will issue against Hon. Joseph W. Woodrough, Judge of the United States District Court for the District of Nebraska, Omaha Division, to show cause in printed form, if any there be, why a writ of mandamus should not issue out of this Court requiring him to call to his assistance two other Federal judges, as provided for by § 266 of the Judicial Code as amended by the act of February 13, 1925 (43 Stat. 936, 938) to hear and determine the case herein at the final hearing. *Messrs. O. S. Stillman, George L. Bayse,* and *Hugh LaMaster* for petitioner.

No. 223. Western Gas Construction Company *v.* Commonwealth of Virginia, at the relation of the State Corporation Commission. Error to the Supreme Court of Appeals of the State of Virginia. Submitted February 27, 1928. Decided March 5, 1928. *Per Curiam.* Affirmed on the authority of *Browning* v. *Waycross,* 233 U. S. 16, 22; *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500, 510. *Messrs. M. J. Fulton, T. J. Michie, Jr.,* and *John S. Brookes, Jr.,* for plaintiff in error. *Messrs.*

Leon M. Bazile and *John R. Saunders* for defendant in error.

No. 227. CORA B. BEATTY, EXECUTRIX, *v.* D. B. HEINER, COLLECTOR. On writ of certiorari to the Circuit Court of Appeals for the Third Circuit. Argued February 28, 1928. Decided March 5, 1928. *Per Curiam.* Affirmed on the authority of *Irwin* v. *Gavit,* 268 U. S. 161, 167, 168. The CHIEF JUSTICE took no part in the consideration or decision of this case. *Mr. W. D. Stewart,* with whom *Messrs. Earl F. Reed* and *W. A. Seifert* were on the brief, for petitioner. *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for respondent.

No. 230. HENRY ELLISON ET AL. *v.* MAX KOSWIG, TRADING AS F. F. KOSWIG. On writ of certiorari to the Superior Court of the State of Pennsylvania. Argued February 28, 1928. Decided March 5, 1928. *Per Curiam.* The grounds which were presented in the petition for certiorari, because of which the writ was granted, do not prove to have a substantial basis in the record because of the lack of assignments of error therein showing the proper presentation of federal questions to the Superior Court of the State. The certiorari heretofore granted in this case is, therefore, vacated on the authority of *Missouri Pacific Railroad Co.* v. *Hanna,* 266 U. S. 184; *El Paso & Southwestern Railroad Co.* v. *Eichel,* 226 U. S. 590, 598; *Chicago, Indianapolis & Louisville Ry. Co.* v. *McGuire,* 196 U. S. 128, 131, 132. *Mr. John G. Kaufman,* with whom *Messrs. H. Edgar Barnes* and *Albert T. Bauerle* were on the brief, for petitioners. *Messrs. Julius Henry Cohen* and *Kenneth Dayton* were on the brief for respondent.

No. 256. MRS. JAMES A. SWAYNE *v.* CITY OF HATTIESBURG, MISSISSIPPI. Error to the Supreme Court of the State of Mississippi. Submitted February 29, 1928. Decided March 5, 1928. *Per Curiam.* Affirmed on the authority of *Embree* v. *Kansas City Road District,* 240 U. S. 242, 250; *Valley Farms Co.* v. *Westchester County,* 261 U. S. 155, 162, 164. *Mr. T. J. Wills* for plaintiff in error. *M. J. N. Flowers* for defendant in error.

No. 709. LILLIAN WEARE *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. March 5, 1928. *Per Curiam.* The petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit is granted, and, on confession of error by the United States, the judgment is reversed and the cause is remanded with directions to dismiss the case. *Mr. Donald G. Hughes* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 301. C. P. AND S. J. BEATY ET AL. *v.* W. S. RICHARDSON, TAX COLLECTOR. Error to the Supreme Court of the State of Georgia. Submitted March 5, 1928. Decided March 12, 1928. *Per Curiam.* Dismissed for want of jurisdiction for the reason that the federal questions sought to be presented were by the record abandoned in the State Supreme court. *Harding* v. *Illinois,* 196 U. S. 78, 88; *Hulbert* v. *Chicago,* 202 U. S. 275, 281; *Central Union Telephone Co.* v. *Edwardsville,* 269 U. S. 190, 194, 195. *Mr. R. E. Church* for plaintiffs in error. *Messrs. George M. Napier* and *T. R. Gress* for defendant in error.

No. 291. PENINSULA PRODUCE EXCHANGE *v.* NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY. Error to the

Court of Appeals of the State of Maryland. Argued March 5, 1928. Decided March 12, 1928. *Per Curiam.* Affirmed on the authority of *Kansas City Southern Ry. Co.* v. *Wolf,* 261 U. S. 133, 139, 140; *Danzer & Co.* v. *Gulf & Ship Island R. R. Co.,* 268 U. S. 633, 636. *Mr. J. M. Crockett,* with whom *Messrs. George F. Graham* and *Robert E. Quirk* were on the brief, for plaintiff in error. *Messrs. F. D. McKenney, John S. Flannery, George R. Allen, and Henry W. Biklé* were on the brief for defendants in error.

No. 292. ARTHUR E. HOFFMAN, EXECUTOR, *v.* THE INDUSTRIAL COMMISSION OF OHIO. Error to the Supreme Court of the State of Ohio. Motion to dismiss submitted March 5, 1928. Decided March 12, 1928. *Per Curiam.* The motion to dismiss is granted for want of a federal question. *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. Frank Davis, Jr.,* and *Edward C. Turner* for defendant in error in support of the motion. *Messrs. Wm. H. Miller* and *Frank H. Ward* for plaintiff in error in opposition thereto.

No. 296. C. A. KING & COMPANY *v.* D. O. HORTON; and No. 304. D. O. HORTON *v.* C. A. KING & COMPANY. Error to the Supreme Court of the State of Ohio. Argued March 5, 1928. Decided March 12, 1928. *Per Curiam.* The writs of error are dismissed for want of jurisdiction for the reason that the only federal questions presented are frivolous, on the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toup* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Town of Graham,* 253 U. S. 193, 195; *Seaboard Air Line* v. *Padgett,* 236, U. S. 668, 671; *Quong Ham Wah Co.* v. *Industrial Com-*

mission, 255 U. S. 445, 448, 449. *Mr. Morris Townley,* with whom *Messrs. Robert Newbegin* and *E. R. Morrison* were on the brief, for King & Co. *Mr. A. L. Gebhard,* with whom *Mr. E. R. Effler* was on the brief, for Horton.

No. 297. Beatrice Grayson Johnson *v.* Wright Thornburgh, Administrator, et al. On writ of certiorari to the Supreme Court of the State of Oklahoma. Argued March 7, 1928. Decided March 12, 1928. *Per Curiam.* Dismissed for want of a federal question in that the decision of the court below could be sustained, and was sustained, on non-federal grounds. *Eustis* v. *Bolles,* 150 U. S. 361, 366, 370; *New York ex rel. Doyle* v. *Atwell,* 261 U. S. 590, 592; *Richardson Machinery Co.* v. *Scott, ante,* p. 128. *Mr. A. L. Emery,* with whom *Mr. C. B. McCrory* was on the brief, for petitioner. *Messrs. Joseph L. Hull, Nathan A. Gibson,* and *James M. Hays* were on the brief for respondents.

No. 319. Standard Pipe Line Company, Inc., et al. *v.* Commissioners of Index Sulphur Drainage District. Error to the Supreme Court of the State of Arkansas. Argued March 7, 1928. Decided March 12, 1928. *Per Curiam.* The writ of error is dismissed on the authority of § 237 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. *Jett Bros. Distilling Co.* v. *City of Carrollton,* 252 U. S. 1, 5, 6. Upon the application of the plaintiffs in error the writ will be treated as a petition for a writ of certiorari and will be considered upon the filing of briefs on such petition on or before March 21, 1928. *Mr. Wm. H. Arnold,* with whom *Mr. David C. Arnold* was on the brief, for plaintiffs in error. *Mr. Henry Moore, Jr.,* was on the brief for defendants in error.

No. 321. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* EDGAR M. WRIGHT, GUARDIAN. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Argued March 7, 1928. Decided March 12, 1928. *Per Curiam.* Affirmed for the reason that the amount involved is not sufficient to sustain federal jurisdiction, on the authority of *Elgin* v. *Marshall,* 106 U. S. 578, 580; *Opelika City* v. *Daniel,* 109 U. S. 108, 109; *Vicksburg, Shreveport & Pacific R. R. Co.* v. *Smith,* 135 U. S. 195, 200; *The Sydney,* 139 U. S. 331, 334, 336; *New England Mortgage Co.* v. *Gay,* 145 U. S. 123, 127. *Mr. Wm. D. Arant,* with whom *Mr. Frederick L. Allen* was on the brief, for petitioner. *Messrs. B. P. Crum* and *Richard T. Rives* were on the brief for respondent.

No. 364. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* STATE OF WISCONSIN; and

No. 365. NEW YORK LIFE INSURANCE COMPANY *v.* STATE OF WISCONSIN. Error to the Supreme Court of the State of Wisconsin. Argued March 8, 9, 1928. Decided March 12, 1928. *Per Curiam.* Dismissed for want of a substantial federal question, on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. J. Gilbert Hardgrove,* with whom *Messrs. George P. Miller, Edwin S. Mack, Arthur W. Fairchild,* and *Frederick L. Allen* were on the brief, for plaintiffs in error. *Messrs. John W. Reynolds* and *T. L. McIntosh* were on the brief for the State of Wisconsin.

No. 366. G. F. DEGRAFF, TREASURER, *v.* CITY OF SPOKANE, WASHINGTON. Error to the Supreme Court of the State of Washington. Argued March 9, 1928. Decided March 12, 1928. *Per Curiam.* Dismissed for want of a

federal question, on the authority of *Risty* v. *Chicago, Rock Island & Pacific Ry Co.*, 270 U. S. 378, 390; *City of Trenton* v. *New Jersey*, 262 U. S. 182, 192; *City of Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394, 399; *Maryland* v. *B. & O. R. R. Co.*, 3 Howard 534, 550, 551; *Edgewood* v. *Wilkinsburg & East Pittsburgh Street Ry. Co.*, 258 U. S. 604; *Avon* v. *Detroit United Railways*, 257 U. S. 618; *Chicago* v. *Chicago Ry. Co.*, 257 U. S. 617; *Chicago* v. *Dempcy*, 250 U. S. 651. *Messrs. Charles W. Greenough* and *A. O. Colburn*, with whom *Mr. Samuel M. Driver* was on the brief, for plaintiff in error. *Messrs. J. M. Geraghty* and *Alex M. Winston* were on the brief for defendant in error.

No. 615. THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY *v.* THE TRANSIT COMMISSION OF THE STATE OF NEW YORK; and

No. 616. THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY AND THE STATEN ISLAND RAILWAY COMPANY *v.* THE TRANSIT COMMISSION OF THE STATE OF NEW YORK. Error to the Transit Commission of the State of New York. Motion to amend writ of error submitted March 12, 1928. Decided March 19, 1928. *Per Curiam*: The writs of error are dismissed for lack of jurisdiction in that the writs herein are not directed to a court, but to an administrative commission. MR. JUSTICE MCREYNOLDS, MR. JUSTICE SANFORD, and MR. JUSTICE STONE entertain a different view.

The motions to amend the writs of error, or for other appropriate relief in the premises, or that the writs of error be treated as petitions for certiorari to the Court of Appeals of the State of New York, are denied. *Mr. Frederick H. Wood* for plaintiffs in error. *Messrs. Clarence M. Lewis* and *George P. Nicholson* for defendant in error.

No. 538. A. B. CAPLINGER, COUNTY JUDGE OF POINSETT COUNTY, ARKANSAS, *v.* UNITED STATES ON RELATION OF HARRIMAN NATIONAL BANK. On writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss submitted March 12, 1928. Decided March 19, 1928. *Per Curiam.* The motion of the respondent to dismiss is granted in view of the recent decision of the Supreme Court of the State of Arkansas in the case of *Jackson* v. *Madison County,* 175 Ark. 826. *Messrs. Harvey D. Jacob, Joe T. Robinson, Joe W. House,* and *C. H. Moses* for respondent in support of the motion. *Mr. A. B. Caplinger, pro se,* in opposition thereto.

No. 830. EDITH E. KELLEY *v.* JAMES COMPTON ET AL. Appeal from the Supreme Court of the State of Washington. March 19, 1928. *Per Curiam.* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that no federal question is presented, and that there are no grounds upon which the jurisdiction of this Court can be sustained. The appeal is therefore dismissed. Such costs as have already been incurred herein shall, by direction of the Court, be paid by the clerk from the special fund in his custody as provided in the order of October 29, 1926. *Edith E. Kelley, pro se.* No appearance for appellees.

No. 117. DANIEL V. HARKIN AND UNION BANK OF CHICAGO, RECEIVERS, ETC., *v.* EDWARD J. BRUNDAGE, RECEIVER, ETC., ET AL. Motion submitted March 12, 1928. Decided March 19, 1928. The motion to amend the opinion already filed in this case is granted as to one addition on page eleven, and denied in other respects. *Mr. Henry J. Darby* for respondents in support of the motion. No appearance for petitioners. [The opinion is reported *ante* p. 37, amended as here ordered.]

No. 387. BANK OF INDIANOLA ET AL. *v.* W. J. MILLER, REVENUE AGENT OF THE STATE OF MISSISSIPPI. Error to the Supreme Court of the State of Mississippi. Argued March 12, 1928. Decided March 19, 1928. *Per Curiam.* Dismissed for want of a substantial federal question on the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toup* v. *Ulysses Land Co.,* 237 U. S. 580, 585; *Piedmont Power & Light Co.* v. *Town of Graham,* 253 U. S. 193, 195; *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 671; *Quong Ham Wah Co.* v. *Industrial Commission,* 255 U. S. 445, 448, 449. *Mr. Cary C. Moody,* for plaintiffs in error, submitted. *Mr. J. H. Sumrall,* with whom *Mr. Marion W. Reily* was on the brief, for defendants in error.

No. 388. MAX M. TANNENBAUM AND HANNAH N. TANNENBAUM, BOTH INDIVIDUALLY AND AS EXECUTORS, *v.* JOHN J. O'NIELL, INHERITANCE TAX COLLECTOR. Error to the Supreme Court of the State of Louisiana. Argued March 12, 1928. Decided March 19, 1928. *Per Curiam.* The writ of error is dismissed for want of a final judgment in the highest court of the state as required by § 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937), on the authority of *Haseltine* v. *Central Bank of Springfield* (*No. 1*), 183 U. S. 130, 131; *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Arnold* v. *United States, for the use of Guimarin & Co.,* 263 U. S. 427, 434. *Mr. Benjamin Y. Wolf,* with whom *Mr. Max M. Tannenbaum, pro se,* was on the brief, for plaintiffs in error. *Mr. Harry Gamble,* for defendant in error, submitted.

No. 391. A. R. YOUNG CONSTRUCTION COMPANY AND CECIL L. NEWBOLD, RECEIVER, *v.* D. E. DUNNE, G. C. DUNNE, AND G. M. DUNNE, PARTNERS. Error to the Supreme Court of the State of Kansas. Argued March 12,

1928. Decided March 19, 1928. *Per Curiam.* Dismissed for want of a substantial federal question on the authority of *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147. *Mr. Willard Brooks*, with whom *Mr. Charles N. Miller* was on the brief, for plaintiffs in error. *Messrs. Chester I. Long* and *Austin M. Cowan* were on the brief for defendants in error.

No. 399. GEORGE A. WILCOX *v.* GEORGE B. MUNGER, TAX COLLECTOR, ET AL.; and

No. 400. GEORGE A. WILCOX *v.* TOWN OF MADISON ET AL. Error to the Supreme Court of Errors of the State of Connecticut. Submitted March 12, 1928. Decided March 19, 1928. *Per Curiam.* The writs of error are dismissed for want of a substantial federal question on the authority of *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147. *Mr. George E. Beers* for plaintiff in error. *Messrs. Ernest L. Averill* and *Thomas R. Fitzsimmons* for defendants in error.

No. 610. UNITED STATES *v.* JOHN BARTH COMPANY AND UNITED STATES FIDELITY & GUARANTY COMPANY. On certificate from the Circuit Court of Appeals for the Seventh Circuit. Argued March 13, 1928. Decided March 19, 1928. *Per Curiam.* The questions certified in this case require in their answer a consideration of eight sections in the Revenue Acts of 1918 and 1921, 1924, and of 1926, and are not properly confined to any distinct question or proposition of law and need not be answered. The lower court is not authorized to make, or require this Court to accept, a transfer of the case. The certificate of the two questions is dismissed on the authority of *News*

Syndicate Co. v. *New York Central R. R. Co. et al.*, 275 U. S. 179; *The Folmina*, 212 U. S. 354, 363; *United States* v. *Bailey*, 9 Peters 267, 273, 274; *United States* v. *Mayer*, 235 U. S. 55, 66; *Chicago, Burlington & Quincy Ry. Co.* v. *Williams*, 205 U. S. 444, 451, 454. *Assistant Attorney General Mabel Walker Willebrandt*, with whom *Solicitor General Mitchell* and *Mr. J. Louis Monarch* were on the brief, for the United States. *Messrs. M. K. Whyte* and *Louis Quarles*, with whom *Messrs. Richard S. Doyle* and *S. Sidney Stein* were on the brief, for Barth Co. et al.

No. 663. F. M. Ring *v.* State of Oregon. Error to the Supreme Court of the State of Oregon. Argued March 13, 14, 1928. Decided March 19, 1928. *Per Curiam.* Affirmed on the authority of *Olsen* v. *Smith*, 195 U. S. 332, 342, 343, 345. *Messrs. Thomas Mannix* and *Edward W. Wickey*, with whom *Messrs. Jerry A. Matthews* and *Josephus C. Trimble* were on the brief, for plaintiff in error. *Messrs. I. H. Van Winkle* and *G. C. Fulton* were on the brief for defendant in error.

No. 841. Wallace C. Gaines *v.* State of Washington. Error to the Supreme Court of the State of Washington. March 19, 1928. *Per Curiam.* Upon examination of the record herein submitted, the Court finds that this is not a case in which there is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity; or where is drawn in question the validity of a statute of the State of Washington, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity. It is, therefore, not a case which, under § 237 (a) of the Judicial Code as amended by the act of February 13, 1925 (43 Stat. 936, 937), may be reviewed

by this Court on writ of error, and this Court has no jurisdiction thereof under said section. Treating the writ of error as a petition for writ of certiorari under § 237(c) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 938), the clerk is directed to issue an order returnable April 23 next against Wallace C. Gaines to show cause, if any there be, by printed return and printed brief, why the petition for certiorari should not be denied for lack of a substantial federal question shown in the record giving this Court jurisdiction. *Mr. W. P. Guthrie* for plaintiff in error. *Mr. Ewing D. Colvin* for defendant in error.

No. 877. JOE WYSONG *v.* PEOPLE OF THE STATE OF CALIFORNIA. Error to the District Court of Appeals, Second Appellate District, State of California. April 9, 1928. *Per Curiam.* Upon consideration of the record herein submitted, the Court finds that this is not a case in which there is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity; or where is properly drawn in question the validity of a statute of the State of California, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity. It is, therefore, not a case which, under § 237(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937), may be reviewed by this Court on writ of error, and this Court has no jurisdiction thereof under said section. *Jett Bros. Distilling Co. v. City of Carrollton,* 252 U. S. 1, 5, 6.

Treating the writ of error as a petition for writ of certiorari under § 237(c) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937), the Clerk is directed to issue an order returnable April 30th next against Joe Wysong to show cause, if any there be.

by printed return and printed brief, why the petition for certiorari should not be denied for lack of a substantial federal question shown in the record giving this Court jurisdiction. *Mr. James E. Fenton* for plaintiff in error. No appearance for defendant in error.

PETITIONS FOR CERTIORARI GRANTED, FROM JANUARY 4, 1928, TO AND INCLUDING APRIL 9, 1928.

No. 636. ANNA MARIE MANEY *v.* UNITED STATES. January 9, 1928. The petition for a writ of certiorari and the motion for leave to proceed further herein *in forma pauperis* are granted. The clerk is hereby directed to have the record printed forthwith and to pay the cost thereof, as well as the costs already incurred herein, from the special fund in his custody as provided in the order of October 29, 1926. *Messrs. Edwin S. Mack, Louis Marshall* and *Bruno B. Bitker* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 493. ROY OLMSTEAD ET AL. *v.* UNITED STATES;

No. 532. CHARLES S. GREEN ET AL. *v.* UNITED STATES; and

No. 533. EDWARD H. MCINNIS *v.* UNITED STATES. January 9, 1928. Orders were entered on November 21, 1927, denying petitions for certiorari in these cases. Thereafter a petition for rehearing in No. 533 was denied January 3, 1928, and a similar petition has been filed in No. 532. This Court now reconsiders all these three petitions for certiorari and grants the writs therein, limiting their consideration, however, to the question whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tap-

ping, is a violation of the Fourth and Fifth Amendments and, therefore, not permissible in the federal courts. *Messrs. John F. Doré, Frank R. Jeffrey,* and *Arthur E. Griffin* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 633. ADELAIDE F. CHAPMAN *v.* UNITED STATES. January 16, 1928. Petition for a writ of certiorari to the Court of Claims granted. *Mr. Sanford Robinson* for petitioner. *Solicitor General Mitchell* for the United States.

No. 662. SECURITY MORTGAGE COMPANY *v.* CHARLES A. POWERS, TRUSTEE IN BANKRUPTCY. January 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. John E. Benton* for petitioner. *Mr. Walter S. Dillon* for respondent.

No. 674. WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY *v.* DE FOREST RADIO TELEPHONE & TELEGRAPH COMPANY. February 20, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Frederick H. Wood, Drury W. Cooper,* and *Thomas Ewing* for petitioner. *Messrs. Charles E. Hughes, Thomas G. Haight* and *Samuel E. Darby, Jr.,* for respondent.

No. 675. WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY AND EDWARD H. ARMSTRONG *v.* UNITED STATES, ALEXANDER MEISSNER, GENERAL ELECTRIC COMPANY, ET AL. February 20, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Frederick H. Wood, Drury W. Cooper,* and *Thomas Ewing* for petitioners. *Messrs. Charles E.*

Hughes, Thomas G. Haight, Samuel E. Darby, Jr., and *Wm. R. Ballard* for respondents.

No. 659. BOTANY WORSTED MILLS *v.* UNITED STATES. February 27, 1928. Petition for writ of certiorari to the Court of Claims granted. *Mr. Nathan A. Smyth* for petitioner. *Solicitor General Mitchell* for the United States.

No. 678. RICHARD CRANE *v.* COMMONWEALTH OF VIRGINIA AND COUNTY OF CHARLES CITY. February 27, 1928. Petition for writ of certiorari to the Supreme Court of Appeals of the State of Virginia granted. *Mr. A. W. Patterson* for petitioner. *Mr. E. Warren Wall* for respondents.

No. 684. REMINGTON ARMS UNION METALLIC CARTRIDGE COMPANY, INC. *v.* UNITED STATES. February 27, 1928. Petition for writ of certiorari to the Court of Claims granted. *Mr. Wm. Wallace, Jr.,* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway* and *Mr. Dwight E. Rorer* for the United States.

No. 685. NORTHERN COAL & DOCK COMPANY AND GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND *v.* EMMA STRAND AND INDUSTRIAL COMMISSION OF WISCONSIN. February 27, 1928. Petition for writ of certiorari to the Supreme Court of the State of Wisconsin granted. *Messrs. Louis Quarles, Charles B. Quarles, Lyman T. Powell,* and *John S. Sprowls* for petitioners. *Messrs. John A. Cadigan* and *John W. Reynolds* for respondents.

No. 692. THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND TEXARKANA & FORT SMITH RAILWAY COMPANY *v.* ROY HOOPER, TAX COLLECTOR. February 27, 1928.

Petition for writ of certiorari to the Supreme Court of the State of Arkansas granted. *Messrs. F. H. Moore, A. F. Smith, James B. McDonough* and *Samuel W. Moore* for petitioners. *Mr. E. C. Lake* for respondent.

No. 709. WEARE *v.* UNITED STATES. See *ante*, p. 599.

No. 705. UNITED STATES *v.* ROBERT H. LENSON. March 5, 1928. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Mitchell* for the United States. *Messrs. George A. King, Wm. B. King,* and *George R. Shields* for respondent.

No. 707. PACIFIC STEAMSHIP COMPANY *v.* CARL G. PETERSON. March 5, 1928. Petition for writ of certiorari to the Supreme Court of the State of Washington granted. *Messrs. Benjamin S. Grosscup, W. Carr Morrow,* and *J. O. Davies for petitioner.* No appearance for respondent.

No. 715. JOHN W. GLEASON *v.* SEABOARD AIR LINE RAILWAY COMPANY. March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Edward Brennan* for petitioner. *Mr. E. Ormonde Hunter* for respondent.

No. 730. BENJAMIN RUSSELL ET AL. *v.* UNITED STATES. March 12, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Douglas Arant* and *Wm. S. Pritchard* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Messrs. J. Louis Monarch, C. M. Charest* and *Ralph E. Smith,* for the United States.

No. 744. JAMES A. REED ET AL. *v.* THE COUNTY COMMISSIONERS OF DELAWARE COUNTY, PENNSYLVANIA, ET AL. March 12, 1928. Petition for writ of certiorari to the Circuit of Appeals for the Third Circuit granted. *Messrs. James A. Reed, Charles L. McNary, Wm. H. King, Guy D. Goff, Jerry C. South, Levi Cooke* and *Frederick P. Lee* for petitioners. *Mr. Albert J. Williams* for respondents.

No. 746. GEORGE TAZEWELL, PRESIDING JUDGE OF THE CIRCUIT COURT, *v.* THE STATE OF OREGON ex rel. EDWARD SULLIVAN. March 12, 1928. Petition for writ of certiorari to the Supreme Court of the State of Oregon granted. *Mr. Erskine Wood* for petitioner. *Mr. Wallace McCamant* for respondent.

No. 747. ATLANTIC COAST LINE RAILROAD COMPANY *v.* C. M. TYNER, ADMINISTRATOR. March 12, 1928. Petition for writ of certiorari to the Supreme Court of the State of South Carolina granted. *Messrs. Thomas W. Davis* and *Simeon Hyde* for petitioner. *Mr. Lionel K. Legge* for respondent.

No. 771. HUBERT WORK, SECRETARY OF THE INTERIOR, *v.* STANDARD OIL COMPANY. March 12, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. W. C. Morrow* for petitioner. *Messrs. Oscar Sutro* and *Louis Titus* for respondent.

No. 736. A. LEO WEIL AND CHARLES M. THORP *v.* EDWARD M. NEARY. March 19, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. A. Leo Weil, pro se,* for petitioners. *Mr. Louis Marshall* for respondent.

No. 700. UNITED STATES *v.* THE CAMBRIDGE LOAN AND BUILDING COMPANY. April 9, 1928. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States. *Mr. L. L. Hamby* for respondent.

No. 770. ATLANTIC COAST LINE RAILROAD COMPANY *v.* MORGAN L. DAVIS, ADMINISTRATOR. April 9, 1928. Petition for writ of certiorari to the Supreme Court of the State of South Carolina granted. *Messrs. Thomas W. Davis* and *Henry E. Davis* for petitioner. *Mr. Thomas H. Peeples* for respondent.

No. 319. STANDARD PIPE LINE COMPANY, INC., ET AL. *v.* COMMISSIONERS OF INDEX SULPHUR DRAINAGE DISTRICT. April 9, 1928. Petition for writ of certiorari to the Supreme Court of the State of Arkansas granted. *Messrs. Wm. H. Arnold* and *David C. Arnold* for petitioners. *Mr. Henry Moore, Jr.,* for respondent.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED, FROM JANUARY 4, 1928, TO AND INCLUDING APRIL 9, 1928.

No. 660. W. B. MITCHELL *v.* GLENN E. CUNNINGHAM, TRUSTEE IN BANKRUPTCY. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. January 9, 1928. The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the record herein submitted, finds that there are no grounds upon which certiorari can be issued, application for which is therefore also denied.

The costs already incurred herein shall, by direction of the Court, be paid by the clerk from the special fund in

his custody, as provided in the order of October 29, 1926. *Mr. W. B. Mitchell, pro se.* No appearance for respondent.

No. 664. FLOYD RICHARDSON *v.* CALIFORNIA. On petition for writ of certiorari to the Supreme Court of the State of California. January 9, 1928. The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there are no grounds upon which certiorari can be issued, application for which is therefore also denied.

The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody, as provided in the order of October 29, 1926. *Mr. Floyd Richardson, pro se.* No appearance for respondent.

No. 454. HARRY HAWKINS *v.* ELMER E. KLEIN. See *ante*, p. 588.

No. 143. EMMA SANGO *v.* WILLIAM WILLIG. See *ante*, p. 589.

No. 626. MILTON A. NELMS *v.* UNITED STATES. January 9, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Everett J. Smith* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 627. EASTERN COAL AND EXPORT CORPORATION *v.* NORFOLK AND WESTERN RAILWAY COMPANY. January 9, 1928. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied.

Mr. Sherlock Bronson for petitioner. No appearance for respondent.

No. 628. WARNER MARSHALL *v.* WALTER D. LOVELL. January 9, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Franklin F. Phillips* for petitioner. *Mr. James D. Shearer* for respondent.

No. 629. WM. WRIGLEY, JR., COMPANY *v.* L. P. LARSON, JR., COMPANY. January 9, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Wallace R. Lane* and *Isaac H. Mayer* for petitioner. *Messrs. Charles H. Aldrich* and *George I. Haight* for respondent.

No. 632. THE DE LASKI & THROPP CIRCULAR WOVEN TIRE COMPANY *v.* MURRAY RUBBER COMPANY. January 9, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas G. Haight* and *E. Clarkson Seward* for petitioner. *Messrs. Drury W. Cooper* and *Luther E. Morrison* for respondent.

No. 637. GRAVER CORPORATION *v.* FRED MANSUR, TRUSTEE IN BANKRUPTCY. January 9, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. H. S. Lewis* for petitioner. *Mr. Byron C. Hanna* for respondent.

No. 638. NEW AMSTERDAM CASUALTY COMPANY *v.* W. T. TAYLOR CONSTRUCTION COMPANY. January 9, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Augustus Benners* for petitioner. *Mr. E. H. Cabaniss* for respondent.

No. 640. ALYEA-NICHOLS COMPANY *v.* JOHN L. PICKERING, COLLECTOR OF INTERNAL REVENUE; and

No. 641. ALYEA-NICHOLS COMPANY *v.* UNITED STATES. January 9, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Charles H. Shamel, Rufus M. Potts,* and *Joseph W. Cox* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Mabel Walker Willebrandt* for respondents.

No. 686. MRS. RUBY INGLETT ARRINGTON *v.* THE GRAND LODGE OF BROTHERHOOD OF RAILROAD TRAINMEN AND MRS. ETHEL INGLETT. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. January 16, 1928. The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted finds that there are no grounds upon which certiorari can be issued, application for which is therefore also denied. The costs already incurred herein by direction of the Court shall be paid by the Clerk from the special fund in his custody as provided in the order of October 29, 1926. *Ruby Inglett Arrington, pro se.* No appearance for respondents.

No. 635. LACQUER & CHEMICAL CORPORATION *v.* CHESTER P. MILLS, FEDERAL PROHIBITION ADMINISTRATOR, ET AL. January 16, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lewis Landes* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for respondents.

No. 644. TOWNSHIP OF MAPLEWOOD *v.* MAX MARGOLIS. January 16, 1928. Petition for a writ of certiorari to the

Court of Errors and Appeals of the State of New Jersey denied. *Mr. A. P. Bachman* for petitioner. *Mr. William L. Woodward* for respondent.

No. 645. TOWNSHIP OF MAPLEWOOD, AND REINHARDT O. OSTERMAN, BUILDING INSPECTOR, *v.* MAX MARGOLIS. January 16, 1928. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. A. P. Bachman* for petitioners. *Mr. William L. Woodward* for respondent.

No. 647. THE MONUMENT POTTERY COMPANY *v.* IMPERIAL COAL CORPORATION. January 16, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edward L. Katzenbach* for petitioner. *Messrs. Gibbs L. Baker* and *Henry Ravenel* for respondent.

No. 648. W. S. MCCRAY *v.* SAPULPA PETROLEUM COMPANY ET AL. January 16, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. F. E. Riddle* for petitioner. *Mr. Claude H. Rosenstein* for respondents.

No. 649. OLAF STROMLAND ET AL. *v.* MYSTIC STEAMSHIP COMPANY, CLAIMANT. January 16, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. L. Morewitz* for petitioners. *Mr. Henry H. Little* for respondent.

No. 646. MINNIE H. LEACH *v.* FLOYD E. FISCHER, GUARDIAN. January 23, 1928. Petition for a writ of

certiorari to the Supreme Court of the State of Kansas denied. *Messrs. I. N. Watson* and *R. E. Watson* for petitioner. *Mr. T. M. Lillard* for respondent.

No. 650. PAUL RUBIO *v.* UNITED STATES; and

No. 651. IRVING M. AUSTIN *v.* UNITED STATES. January 23, 1928. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Maxwell McNutt* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Louise Foster* for the United States.

No. 652. IRVING M. AUSTIN *v.* UNITED STATES. January 23, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clarence V. Opper* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt* and *Mr. K. L. Campbell* for the United States.

No. 656. FINANCE & GUARANTY COMPANY OF BALTIMORE, MD., *v.* HARRY C. STITT, TRUSTEE IN BANKRUPTCY. January 23, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. James G. Glessner* and *Leo Oppenheimer* for petitioner. *Mr. Clayton E. Emig* for respondent.

No. 658. THE LAWRENCE-WILLIAMS COMPANY *v.* SOCIETE ENFANTS GOMBAULT, ET CIE. January 23, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John F. Oberlin* for petitioner. *Messrs. Lanier McKee* and *James R. Garfield* for respondent.

No. 661. THE CITIZENS & SOUTHERN BANK *v.* CARRIE Y. FAYRAM, EXECUTRIX. January 23, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert C. Alston* for petitioner. *Mr. Charles B. Shelton* for respondent.

No. —. ADDIE ROBINSON, ADMINISTRATRIX, *v.* AMERICAN CAR AND FOUNDRY COMPANY. February 20, 1928. The motion for leave to file petition for a writ of certiorari is denied. *Mr. J. Gray Lucas* for petitioner. No appearance for respondent.

No. 642. STEVE NECHAY *v.* UNITED STATES. February 20, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Robert Black* and *Frank Davis* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt* and *Mr. K. L. Campbell* for the United States.

No. 654. P. DERONDE & CO., INC., *v.* UNITED STATES. February 20, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Robert Ash* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 655. NATIONAL CITY BANK OF SEATTLE *v.* UNITED STATES. February 20, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Robert Ash* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 657. W. M. Farris et al. *v.* Illinois Bankers Life Association et al. February 20, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Jesse L. England* for petitioners. *Messrs. R. F. Potter* and *L. A. Stebbins* for respondents.

No. 665. Herman Miller *v.* United States. February 20, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Bernhardt Frank* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 669. United States ex rel. Louis C. Mouquin *v.* William C. Hecht, United States Marshal. February 20, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John E. Joyce* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Mahlon D. Kiefer* for respondent.

No. 672. Charles M. Baker *v.* United States. February 20, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. L. S. Parsons* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Mabel Walker Willebrandt* for the United States.

No. 681. Morris & Cummings Dredging Company, Inc., *v.* Cahill Towing Line, Inc., as owner of the steam tug "Anna W," et al. February 20, 1928. Peti-

tion for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James D. Carpenter, Jr.*, for petitioner. *Mr. George V. A. McCloskey* for respondents.

No. 631. L. F. Vance *v.* Chicago Portrait Company et al. February 27, 1928. The suggestion of a diminution of the record and motion for a writ of certiorari in this case is denied. *Mr. L. F. Vance, pro se. Mr. John T. Evans* for respondent.

No. 721. Byron Dunn and W. Robert Dunn *v.* J. Horace Lyons, Sheriff. On petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. February 27, 1928. The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there are no grounds upon which certiorari can be issued, application for which is therefore also denied. The motion of the petitioner for a refund of the deposit heretofore made in the case is denied. Such additional costs as may have already been incurred herein and not paid shall, by direction of the Court, be paid by the clerk from the special fund in his custody as provided in the order of October 29, 1926. *Messrs. M. G. Adams* and *C. W. Howth* for petitioners. No appearance for respondent.

No. 667. Chicago, Milwaukee & St. Paul Railway Company *v.* United States. February 27, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. F. Carter Pope* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Lisle A. Smith* for the United States.

No. 668. JOHN MORINI *v.* UNITED STATES. February 27, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Wm. J. Mossholder* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 670. ALFRED H. BEACH *v.* UNITED STATES. February 27, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frans E. Lindquist* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 671. PAGE STEEL & WIRE COMPANY *v.* BLAIR ENGINEERING COMPANY. February 27, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. James M. Gifford, Wilson B. Brice,* and *Forrest M. Anderson* for petitioner. *Mr. Merritt Lane* for respondent.

No. 677. SIDNEY T. EWERT, EXECUTOR, ET AL. *v.* GEORGIA VALLIERE HAMPTON ET AL. February 27, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Joseph C. Stone, A. C. Wallace,* and *Wm. M. Matthews* for petitioners. *Mr. Joseph W. Howell* for respondents.

No. 680. FARMERS UNION GRAIN COMPANY *v.* HALLET & CAREY COMPANY. February 27, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John Junell* and *Egbert S. Oakley* for petitioner. *Mr. Frederick H. Stinchfield* for respondent.

No. 683. Farmers State Bank and Guarantee Fund Commission of Nebraska *v.* Metropolitan Savings Bank & Trust Company. February 27, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Charles M. Skiles* and *Ernest B. Perry* for petitioners. No appearance for respondent.

No. 688. Eagle Indemnity Company *v.* United States. February 27, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. John S. Rixey* and *Cleaton E. Rabey* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 689. Baltimore and Ohio Railroad Company *v.* Edward Bilyeu. February 27, 1928. Petition for writ of certiorari to the Appellate Court of the State of Illinois, Fourth District, denied. *Messrs. Wm. A. Eggers, Edward C. Kramer, Rudolph J. Kramer, Bruce A. Campbell,* and *Morison R. Waite* for petitioner. *Messrs. Louis Beasley* and *Edward C. Zulley* for respondent.

No. 690. Fred S. Hudson, Trustee in Bankruptcy, et al. *v.* Maryland Casualty Company. February 27, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry A. Bundschu* for petitioners. *Messrs. Spencer Harris* and *Clyde Taylor* for respondent.

No. 693. The Buckeye Incubator Company and Samuel B. Smith *v.* Ira M. Petersime and Ray Petersime. February 27, 1928. Petition for writ of certiorari

to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Charles E. Brock, Newton D. Baker,* and *Charles Neave* for petitioners. *Messrs. H. A. Toulmin* and *H. A. Toulmin, Jr.,* for respondents.

No. 694. CAROLINE A. ALLISON ET AL. *v.* HARRY J. SCHNELL AND FRANK V. BALDWIN, EXECUTORS AND TRUSTEES, ET AL. February 27, 1928. Petition for writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Messrs. Wilton J. Lambert, Rudolph H. Yeatman,* and *George D. Horning, Jr.,* for petitioners. *Messrs. Josiah Stryker* and *Edward L. Katzenbach* for respondents.

No. 695. VIRGINIA SHIPBUILDING CORPORATION AND JOSEPH L. CRUPPER, RECEIVER IN BANKRUPTCY, *v.* UNITED STATES. February 27, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Wm. A. Barber, Wm. L. Day, J. K. M. Norton,* and *James K. Caton* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Messrs. J. Frank Staley, Chauncey G. Parker,* and *W. W. Nottingham* for the United States.

No. 230. ELLISON ET AL. *v.* KOSWIG. See *ante,* p. 598.

No. 691. AUSTIN MORLEY ET AL. *v.* HERBERT A. WILSON, POLICE COMMISSIONER. March 5, 1928. Petition for writ of certiorari to the Superior Court for the County of Suffolk, State of Massachusetts, denied. *Messrs. Romney Spring* and *Wm. G. Thompson* for petitioners. *Mr. Herbert Parker* for respondent.

No. 698. MORRIS & COMPANY *v.* K. IKUNO, MASTER AND CLAIMANT OF THE STEAMSHIP "NAPLES MARU." March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. George M. Lanning* and *Edward R. Baird, Jr.*, for petitioner. *Mr. George C. Sprague* for respondent.

No. 702. GREATER NEW YORK DOCK & WAREHOUSE CO. *v.* STAPLETON DOCK & WAREHOUSE CORPORATION AND THE CITY OF NEW YORK. March 5, 1928. Petition for writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Samuel Silbiger* for petitioner. *Messrs. Albert S. Boardman* and *George P. Nicholson* for respondents.

No. 703. KNICKERBOCKER FUEL COMPANY *v.* ANDREW W. MELLON, DIRECTOR GENERAL. March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John G. Poore* for petitioner. *Mr. Frederick H. Wood* for respondent.

No. 704. STATE OF WASHINGTON, ON THE RELATION OF CROOKER PERRY AND LEONORA PERRY *v.* THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF CHELAN, THE HONORABLE W. O. PARR, JUDGE, ET AL. March 5, 1928. Petition for writ of certiorari to the Supreme Court of the State of Washington denied. *Mr. Frank Reeves* for petitioners. *Messrs. F. G. Dorety, Thomas Balmer, Frank T. Post,* and *Charles S. Albert* for respondents.

No. 706. MARION & EASTERN RAILROAD COMPANY *v.* ILLINOIS CENTRAL RAILROAD COMPANY. March 5, 1928. Petition for writ of certiorari to the Supreme Court of the

State of Illinois denied. *Mr. Henry C. Keene* for petitioner. *Messrs. R. V. Fletcher* and *Edward C. Craig* for respondent.

No. 708. THOMAS CRAVEN *v.* UNITED STATES. March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Wm. H. Lewis* and *Matthew L. McGrath* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 710. W. S. MCCRAY *v.* J. A. FULP, RECEIVER FOR THE SAPULPA PETROLEUM COMPANY, AND SAPULPA PETROLEUM COMPANY. March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Finis E. Riddle* for petitioner. No appearance for respondents.

No. 711. MARTIME GINAL *v.* BENJAMIN M. DAY, COMMISSIONER OF IMMIGRATION. March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Hugh Reid* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 713. JOHN QUINLAN ET AL. *v.* UNITED STATES. March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles Akerman* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 714. ABRAHAM BUCKSPAN *v.* THE HUDSON'S BAY COMPANY. March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. George O. Wallace* and *W. L. Crawford* for petitioner. *Mr. Robert E. L. Saner* for respondent.

No. 718. JOHN C. TOBIN, TRUSTEE IN BANKRUPTCY, *v.* SAMUEL ACKERMAN;

No. 719. JOHN C. TOBIN, TRUSTEE IN BANKRUPTCY, *v.* BARNETT KLEINMAN; and

No. 720. JOHN C. TOBIN, TRUSTEE IN BANKRUPTCY, *v.* JOSEPH GOLDMUNTZ ET AL. March 5, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Jacob M. Lashly* for petitioner. *Mr. Harry S. Gleick* for respondents.

No. 724. DULUTH & IRON RANGE RAILROAD COMPANY, *v.* CITY OF DULUTH. March 5, 1928. Petition for writ of certiorari to the Supreme Court of the State of Minnesota denied. *Messrs. Frank D. Adams* and *Elmer F. Blu* for petitioner. *Mr. John B. Richards* for respondent.

No. 726. JOSIAH T. ROSE, COLLECTOR, *v.* NUNNALLY INVESTMENT COMPANY. March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Messrs. C. M. Charest, L. H. Baylies,* and *K. L. Campbell* for petitioner. *Messrs. Clifford L. Anderson* and *Daniel W. Rountree* for respondent.

No. 731. AETNA INSURANCE COMPANY, AGRICULTURAL INSURANCE COMPANY, ALLEMANNIA FIRE INSURANCE COMPANY, ET AL. *v.* WILLIAM R. BAKER, SUPERINTENDENT OF INSURANCE. March 5, 1928. Petition for writ of cer-

tiorari to the Supreme Court of the State of Kansas denied. *Messrs. Robert Stone, R. J. Folonie, Charles E. Hughes,* and *John L. Hunt* for petitioners. *Messrs. Wm. A. Smith, John G. Egan,* and *John F. Rhodes* for respondent.

No. 732. JOE H. TIGER *v.* WILLIAM M. FEWELL ET AL. March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wm. Neff* for petitioner. No appearance for respondents.

No. 734. IRA JEWELL WILLIAMS *v.* BLAKELY D. MCCAUGHN, COLLECTOR. March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Francis S. Brown* and *Ira Jewell Williams, Jr.,* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Sewall Key* for respondent.

No. 737. ROBERT C. ADAMS *v.* UNITED STATES. March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Wm. W. Chadbourne* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. J. Frank Staley* for the United States.

No. 738. MISSOURI PACIFIC RAILROAD COMPANY *v.* MRS. FANNIE SKIPPER, ADMINISTRATRIX. March 5, 1928. Petition for writ of certiorari to the Supreme Court of the State of Arkansas denied. *Messrs. Thomas B. Pryor* and *Edward J. White* for petitioner. *Mr. Frank P. Pace* for respondent.

No. 741. W. K. HORTON, SUING AS GUARDIAN, ET AL. *v.* NEW YORK LIFE INSURANCE COMPANY. March 5, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry H. Smith* for petitioners. *Mr. T. M. Stevens* for respondent.

No. 725. WYANDOTTE TERMINAL RAILROAD COMPANY *v.* UNITED STATES. March 12, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Don F. Reed* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 733. STATE OF WASHINGTON EX REL. MIKE LUKICH, ALIAS YUKIJ, ET AL. *v.* SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY AND CALVIN S. HALL, JUDGE THEREOF. March 12, 1928. Petition for writ of certiorari to the Supreme Court of the State of Washington denied. *Mr. John J. Sullivan* for petitioners. *Mr. Howard A. Hanson* for respondents.

No. 735. UNITED STATES EX REL. ISABEL LONDON *v.* CLIFFORD D. PHELPS, UNITED STATES IMMIGRATION INSPECTOR. March 12, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold Van Riper* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 742. SYNTHETIC PATENTS COMPANY, INC. *v.* HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, TREASURER. March 12, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Nelson J. Jewett* and

Lyttleton Fox for petitioner. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Messrs. Robert W. Bonygne,* and *Dean H. Stanley* for respondents.

No. 743. SYNTHETIC PATENTS COMPANY, INC., *v.* HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, TREASURER. March 12, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Nelson J. Jewett* and *Lyttleton Fox* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Messrs. Robert W. Bonygne* and *Dean H. Stanley* for respondents.

No. 749. BARKER PAINTING COMPANY *v.* BROTHERHOOD OF PAINTERS, DECORATORS, AND PAPERHANGERS OF AMERICA, ET AL. March 12, 1928. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Wm. C. Sullivan* for petitioner. *Mr. Vincent A. Sheehy* for respondents.

No. 750. W. A. LEDBETTER ET AL. *v.* ELIAS WESLEY ET AL. March 12, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. H. L. Stuart, R. R. Bell, E. P. Ledbetter, H. A. Ledbetter, L. A. Ledbetter,* and *W. A. Ledbetter, pro se,* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Parmenter,* and *Mr. Charles E. McPherren* for respondents.

No. 752. SAMUEL THOMAS WALKUP *v.* INTERBOROUGH RAPID TRANSIT CO. March 12, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel Thomas Walkup, pro se.* No appearance for respondent.

No. 755. ELMER B. JEFFRIES *v.* SAM L. GROSS, UNITED STATES MARSHAL. March 12, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. B. Harrell* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 756. CHARLES E. FORBES *v.* SAM L. GROSS, UNITED STATES MARSHAL. March 12, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. B. Harrell* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 760. D. H. KEENE *v.* F. T. GAUEN. March 12, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Theodore Mack* for petitioner. No appearance for respondent.

No. 762. EDWARD G. BUDD MANUFACTURING COMPANY *v.* C. R. WILSON BODY COMPANY AND PAUL E. BRENEMAN. March 12, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Melville Church* and *Henry S. Drinker, Jr.,* for petitioner. *Messrs. Wm. J. Belknap* and *Clarence B. Zewadski* for respondents.

Nos. 615, 616. STATEN ISLAND ETC. RY. CO. ET AL. *v.* TRANSIT COMMISSION. See *ante,* p. 603.

No. 754. RICKMERS RHEDEREI ACTIEN GESELLSCHAFT *v.* HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN, ET AL. March 19, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied.

Mr. Reeves T. Strickland for petitioner. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. Dean Hill Stanley* for respondents.

No. 761. Babcock Printing Press Manufacturing Company *v.* Robert L. Murphy, Trustee in Bankruptcy. March 19, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. A. P. Bachman* for petitioner. *Mr. Leon E. Cone* for respondent.

No. 772. W. D. Dilbeck et al. *v.* State of Texas. March 19, 1928. Petition for a writ of certiorari to the Court of Civil Appeals, 3rd Supreme Judicial District, State of Texas, denied. *Messrs. W. J. Rutledge, Jr.,* and *R. L. Batts* for petitioners. No appearance for respondent.

No. 775. Manufacturers' Finance Company *v.* Frederick S. Foster, Trustee. March 19, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Harrison J. Barrett, Lee M. Friedman, Percy A. Atherton,* and *George W. Reed* for petitioner. *Mr. Robert A. B. Cook* for respondent.

No. 777. Seth B. Orndorff et al. *v.* El Paso County, Texas, et al. March 19, 1928. Petition for writ of certiorari to the Court of Civil Appeals, 8th Supreme Judicial District, State of Texas, denied. *Mr. Wm. C. Dennis* for petitioners. No appearance for respondents.

No. 778. Lorenzo Veneri *v.* Charles H. Draper, Receiver; and

No. 779. ERMIN MARIOTTI *v.* CHARLES H. DRAPER, RECEIVER. March 19, 1928. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Russel S. Ritz* for petitioners. *Mr. M. M. Neely* for respondent.

No. 780. HOME INSURANCE COMPANY OF NEW YORK *v.* LAKIN C. HIGHTOWER AND WINSTON S. GARTH, PARTNERS. March 19, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Alex W. Spence* and *C. M. Smithdeal* for petitioner. *Mr. A. J. Harris* for respondents.

No. 682. ROCCO DEBELLIS *v.* UNITED STATES. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Robert A. Milroy* and *Benjamin P. Epstein* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 739. ANNA LOUISE NOLDE *v.* UNITED STATES. April 9, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Walter E. Barton* and *Harry F. Kantner* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 733. STUYVESANT INSURANCE COMPANY *v.* JACKSONVILLE OIL MILL. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Bruce Barnett* for petitioner. *Mr. Wm. P. Metcalf* for respondent.

No. 774. THE GLOBE AND RUTGERS FIRE INSURANCE COMPANY *v.* JACKSONVILLE OIL MILL. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Bruce Barnett* for petitioner. *Mr. Wm. P. Metcalf* for respondent.

No. 776. JOHN THOMAS GILLESPIE AND SAMUEL HASSARD GILLESPIE, CO-PARTNERS, *v.* HONG KONG & SHANGHAI BANKING CORPORATION. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frank J. Hogan* and *Elkan Turk* for petitioners. *Messrs. Garret W. McEnerney* and *Andrew F. Burke* for respondent.

No. 783. UNION PACIFIC RAILROAD COMPANY *v.* LOUIS ILFELD COMPANY. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John W. Lacey, N. H. Loomis,* and *Herbert W. Lacey* for petitioner. *Messrs. Carle Whitehead* and *Albert L. Voge* for respondent.

No. 784. OLIVER CHAPMAN, LICENSE COLLECTOR OF THE CITY OF ST. LOUIS, *v.* INTERNATIONAL SHOE COMPANY. April 9, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri denied. *Messrs. Oliver Senti, Julius T. Muench,* and *George F. Haid* for petitioner. *Mr. Frank Y. Gladney* for respondent.

No. 785. ARMOUR AND COMPANY *v.* BASSEL BROTHERS, A COPARTNERSHIP, ET AL. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth

Circuit denied. *Messrs. Wm. Marshall Bullitt, Charles J. Faulkner, Jr.,* and *Alfred S. Austrian* for petitioner. *Mr. A. L. Curtis* for respondents.

No. 786. ARMOUR AND COMPANY *v.* BELTON NATIONAL BANK. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Wm. Marshall Bullitt, Charles J. Faulkner, Jr.,* and *Alfred S. Austrian* for petitioner. *Mr. A. L. Curtis* for respondents.

No. 787. WILLIAM H. HARDIE *v.* UNITED STATES. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joseph E. Pottle* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 790. JESSE MCGEE ET AL. *v.* W. A. LEDBETTER ET AL. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. D. Lydick* for petitioners. *Messrs. E. P. Ledbetter, L. A. Ledbetter, H. A. Ledbetter, H. L. Stuart, R. R. Bell,* and *W. A. Ledbetter, pro se,* for respondents.

No. 792. GUISEPPE YACONI *v.* BRADY & GIOE, INC. April 9, 1928. Petition for writ of certiorari to the Supreme Court of the State of New York denied. *Messrs. Silas B. Axtell* and *Wm. F. Purdy* for petitioner. No appearance for respondent.

No. 793. KATIE ROUBEDEAUX AND LIZZIE GIBBS ET AL. *v.* QUAKER OIL & GAS COMPANY OF OKLAHOMA, ET AL. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John T. Smith, Thomas D. McKeown,* and *John S. Barbour* for petitioners. *Messrs. George S. Ramsey,*

Alvin Richards, L. O. Lytle, T. J. Flannelly, and *Louis C. Lawson* for respondents.

No. 799. C. G. Schull, Bank Commissioner of the State of Oklahoma, *v.* New Amsterdam Casualty Company;

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No. 801. Same *v.* Fidelity and Deposit Company of Maryland;

No. 802. Same *v.* American Surety Company of New York; and

No. 803. Same *v.* Fidelity & Guaranty Company. April 9, 1928. The petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit is denied. *Mr. Kirby Fitzpatrick* for petitioner. *Messrs. Claude Nowlin* and *J. R. Speelman* for respondent in No. 799. *Mr. James S. Ross* for respondents in Nos. 800 and 801. *Mr. Stephen Chandler* for respondent in No. 802. *Messrs. Joseph A. McCullough* and *C. B. Ames* for respondent in No. 803.

No. 804. George Lee Johnston *v.* United States. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. G. McLaren* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 805. Southern Pacific Company *v.* United States. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. E. R. Wright* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. John T. Fowler, Jr.,* for the United States.

No. 808. THOMAS W. MILLER *v.* UNITED STATES. April 9, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Robert S. Johnstone* and *Samuel Seabury* for petitioner. *Solicitor General Mitchell, Assistant to the Attorney General Donovan,* and *Mr. Charles H. Tuttle* for the United States.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 4, 1928, TO AND INCLUDING APRIL 9, 1928.

No. 446. CHARLEY HEE, ALIAS DONG BOW HEE, *v.* UNITED STATES. On writ of certiorari to the Circuit Court of Appeals for the First Circuit. February 20, 1928. Reversed and remanded, per stipulation of counsel, on motion of *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States. *Messrs. Joseph Fairbanks* and *Dan F. Reynolds* for petitioner.

No. 448. GOON BON JUNE *v.* UNITED STATES. On writ of certiorari to the Circuit Court of Appeals for the First Circuit. February 20, 1928. Reversed and remanded, per stipulation of counsel, on motion of *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Frank M. Parrish* for the United States. *Messrs. Walter Bates Farr* and *Edward Flint Damon* for petitioner.

No. 233. JOHN LAPIQUE, ASSIGNEE OF THE ESTATE OF MIGUEL LEONIS, *v.* HARRY L. DUNNIGAN ET AL. Appeal from the District Court of the United States for the Southern District of California. February 24, 1928. Dismissed pursuant to the 21st rule. *Mr. John Lapique, pro se. Mr. Everett W. Mattoon* for appellees.

The following order, amending the Rules of June 8, 1925, 266 U. S. 653, was made on February 27, 1928, and is here printed in its chronological order. On June 5, 1928, the Rules were revised with important changes, and by order of the Court the revision was printed in Volume 275 U. S. then preparing for press.

ORDER

1. It is now hereby ordered by this court that section 7 of rule 29 of this court be amended by striking therefrom the words "For docketing a case and filing and indorsing the transcript of the record, ten dollars," and inserting in lieu thereof the words "For docketing a case and filing and indorsing the transcript of the record, five dollars."

2. Also, by striking therefrom the words "For preparing the record or a transcript thereof for the printer, in all cases, including records presented with petitions for certiorari, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, eight cents per folio of each one hundred words," and inserting in lieu thereof the words "For preparing the record or a transcript thereof for the printer, in all cases, including records presented with petitions for certiorari, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, four cents per folio of each one hundred words," but leaving therein unchanged the words "but where the necessary printed copies of the record as printed for the use of the court below are furnished, charges under this item will be limited to any additions printed here under the clerk's supervision."

3. Also by striking therefrom the words "For making a manuscript copy of the record when required under rule 11, twenty cents per folio of each one hundred words, but nothing in addition for supervising the printing," and inserting in lieu thereof the words "For making a manu-

script copy of the record when required under rule 11, fifteen cents per folio of each one hundred words, but nothing in addition for supervising the printing."

4. Also, by striking therefrom the words "For filing briefs, five dollars for each party appearing," and inserting in lieu thereof the words "For filing briefs, three dollars for each party appearing."

This order shall apply to causes filed here on or after March 1, 1928, but not to causes filed prior to that date.

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